

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

CRA No. 23/2014
IA Nos. 02/2014, 01/2016 &
01/2018
c/w
CONF No. 11/2014
CRR No. 36/2016

Reserved on:- 22.03.2021

Pronounced on:- 31.03.2021

Mohd. Rashid

.....Appellant/Petitioner(s)

Through :- Mr. P. N. Raina, Sr. Advocate with
Mr. Y. E. Tak, Mrs. Anshuja Tak and
Mr. J. A. Hamal, Advocates

V/s

State of J&K.

.....Respondent(s)

Through :- Mr. Aseem Sawhney, AAG.

CORAM :

HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE

HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

CRR No. 36/2016

Sanjay Dhar-J

1. Petitioner has challenged order dated 17.03.2016 passed by the learned 3rd Additional Sessions, Judge, Jammu (*hereinafter referred to as the "Trial Court"*), whereby, pursuant to the directions of this Court contained in its order dated 05.10.2015, the learned Trial Court has, after conducting inquiry with regard to the plea of juvenility of the petitioner, submitted its report, holding that date of birth of the petitioner is proved to be 12.01.1987 and that

on date of the occurrence, i.e. on 28.08.2005, he was more than 18 years of age and as such, was not a juvenile.

2. Before coming to the aforesaid order of the learned Trial Court and the contentions raised there against by the petitioner in the instant revision petition, it would be profitable to give background of the facts that have led to the instant proceedings.

3. A charge-sheet was laid by the police of Police Station, Pacca Danga, Jammu against the petitioner in pursuance of the investigation conducted by the police in respect of FIR No. 144 of 2005. As per the case of prosecution, petitioner is alleged to have kidnapped minor daughter of PW- Abdul Rehman from his rented accommodation at Rani Talab, Jammu and thereafter, subjected her to forcible sexual intercourse and murder. The occurrence is alleged to have been taken place on 28.08.2005. Thus, the petitioner is alleged to have committed offences under Sections 363, 376 & 302 RPC.

4. The petitioner was, accordingly, tried by the learned Trial Court for commission of the aforesaid offences, whereupon he was convicted for commission of the aforementioned offences in terms of the judgment dated 13.03.2014 passed by the learned Trial Court. Vide order dated 27.03.2014 passed by the learned Trial Court, the petitioner was, in proof of offence under Section 302 RPC, awarded death sentence whereas in proof of offence under Section 376 RPC, he was awarded rigorous imprisonment for life and fine of Rs. 10,000/-. In proof of offence under Section 363 RPC, the petitioner was sentenced to rigorous imprisonment of seven years and fine of Rs. 2,000/-.

5. The aforesaid judgment of conviction and sentence came to be challenged by the petitioner before this Court by way of Criminal Appeal bearing CRA No. 23/2014, which came up for hearing before this Court along with Reference for Confirmation of sentence made by the learned Trial Court before this Court.

6. One of the grounds urged in the appeal by the petitioner herein is that he was a juvenile at the time of commission of alleged offences and that his date of birth was 15.01.1991, which means that at the time of alleged occurrence, i.e. on 28.08.2005, his age was just above 14 years. It is contended by the petitioner in the appeal that the plea of juvenility was raised by him before the learned Trial Court, but the said court landed itself into an error by not declaring him as a juvenile and giving him the benefit of juvenility in terms of the Jammu and Kashmir, Juvenile Justice Act, 1997 (*hereinafter referred to as the "Act of 1997"*), which was applicable at the relevant time.

7. It is pertinent to mention here that before filing of the charge-sheet, the Investigating Officer got the ossification test of the petitioner conducted for the purpose of determination of his age. As per this report, the age of the petitioner was found to be more than 17 years and less than 19 years. After presentation of the charge-sheet on 27.05.2006, the learned counsel representing the petitioner before the Trial Court had placed on record a photo copy of the date of birth certificate issued by the Headmaster, Government Middle School, Takia Magam, according to which, his date of birth was 15.01.1991. The learned Trial Court summoned record pertaining to the said certificate from the concerned school, and the petitioner also produced the original certificate. On 30.10.2006, the learned Trial Court in spite of getting

the record pertaining to the date of birth of the petitioner from the concerned school, observed that by physical appearance, petitioner appears to be more than 18 years of age and a direction was issued to the concerned Police Station to produce the date of birth record of the petitioner. Copy of the entry of birth register received from the Police Station, Kokernag was placed on record, according to which the date of birth of the petitioner was shown to be 12.01.1987. On 11.01.2007, the learned Trial Court relying upon the aforesaid certificate produced by the police, concluded that the certificate issued by the Police Station seems to reflect the correct age of the petitioner and his physical appearance shows that he could be, in no case, less than 18 years. Thereafter, the petitioner was tried as an adult by the learned Trial Court and the trial culminated in passing of the judgment and sentence, which has been impugned by way of the connected appeal.

8. The aforesaid appeal came up for hearing before this Court and upon hearing, a detailed order dated 05.10.2015 came to be passed by this Court. After noticing the aforesaid background facts and the relevant statutes including the development of law pertaining to juveniles in conflict with law that had taken place during the pendency of the case before the Trial Court, this Court passed the following directions:-

“35. We conclude, precisely, that the question of juvenility of the appellant as at the time of alleged commission of offence is required to be inquired into and decided afresh. We therefore, direct the trial court, that is, the Court of learned 3rd Additional Sessions Judge, Jammu to inquire into and determine the age of the appellant as on 28.08.2005, exactly or as nearly as may be, in accordance with the statutory provisions, that is, section 8 of the Act of 2013 read with Rules 74 & 75 of the Rules of 2014 as discussed above and send the record of the inquiry, decision in the matter and the record of the case to this Court. Learned Judge of the trial court is requested that inquiry should be concluded expeditiously and not later than a period of two months after record of the case is received in his court.”

9. It is in the backdrop of the aforesaid directions that the learned Trial Court has conducted a fresh inquiry pertaining to plea of juvenility raised by the petitioner herein. The learned Trial Court has, during the course of inquiry, recorded the statements of the father of the petitioner, Headmaster of Government Primary School, Takia Madam, the authority, which has issued the birth certificate in favour of the petitioner, the Zonal Education Officer, Bidder Kokernag, the Station House Officer and other police officials of Police Station, Kokernag, touching the contents of birth certificate issued by the Police Station, Kokernag, the Chief Medical Officer, Anantnag including the Record Keeper of the said office, the District Statistics and Evaluation Officer, Anantnag including other officials of the said office. The learned Trial Court also got the medical opinion with regard to age estimation of the petitioner from the Medical Board. On the basis of all this material, the learned Trial Court came to the conclusion that the age of the petitioner, as on date of the alleged occurrence, was more than 18 years and that the birth certificate issued by the Police Station, Kokernag in favour of the petitioner reflects his correct date of birth.

10. The aforesaid inquiry report and the findings returned by the learned Trial Court with regard to determination of age of the petitioner has been called into question by the petitioner through the medium of instant revision petition.

11. Mr. Aseem Sawhney, learned AAG, representing the respondent-State has at the very outset raised a preliminary objection with regard to maintainability of the petition on the grounds that the report of the learned

Trial Court cannot be called into question in a revision petition and that if at all, the petitioner had any grievance against the same, it was open to him to file objections to the said report.

12. The second ground urged by the learned AAG is that the petitioner had accepted the finality of the order dated 11.01.2007 passed by the learned Trial Court, whereby the learned Court had concluded that the age of the petitioner as on date of the occurrence was, in no case less than 18 years, inasmuch as he did not challenge the same and continued to undergo trial as an adult before the learned Trial Court without any demur.

13. Before coming to the merits of the issues raised by the learned AAG, let us first be clear as to which statute and the rules would be applicable to the instant case. The occurrence, which is subject matter of the case, is alleged to have taken place on 28.08.2005. At the relevant time, the provisions of the Act of 1997 were in operation. The rules in pursuance of the Act of 1997 were framed only in the year 2007. In the year 2013, the Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act, 2013 (*hereinafter referred to as the “Act of 2013”*) came into force and by virtue of of Section 69 of the Act of 2013, the Act of 1997 came to be repealed. It is pertinent to mention here that as on date of coming into operation of the Act of 2013, the trial of the case was going on before the learned Trial Court. In pursuance of the powers conferred upon the Government in terms of Section 68 of the Act of 2013, the Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Rules, 2014 (*hereinafter referred to as the “Rules of 2014”*) came to be framed.

14. The Act of 2013 contains a special provision in respect of pending proceedings in the shape of Section 21, which read as under:-

“21. Special provision in respect of pending cases.-

Notwithstanding anything contained in the Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Act comes into force in that area, shall be continued in that court as if the Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Act as if it had been satisfied on inquiry under the Act that a juvenile has committed the offence:

Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation:—In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (n) of section 2, even if the juvenile ceases to be so on or before the date of commencement of the Act and the provisions of the Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.”

15. From a perusal of the aforesaid provision, particularly, the explanation thereto, it becomes clear that even in pending cases including those pending at the stage of trial, revision or appeal, the determination of juvenility of a juvenile in conflict with law has to be reckoned in terms of Clause (n) of Section 2 of the Act of 2013 even if the juvenile ceased to be so on or before the date of commencement of the Act. The explanation further provides that the provisions of the Act shall apply, as if the said provisions had been in force for all purposes when the alleged offence was committed. The purport of this provision is that even in the case of pending matters or matters which are at the revisional or appellate stage or in other words, which have not acquired finality, the issue with regard to determination of juvenility of a child in conflict with law has to be governed by the provisions contained in the Act of 2013. It is pertinent to mention here that in terms of the Section 2(n) of the Act

of 1997, the age of juvenility in case of a male child was fixed as 16 years, whereas in terms of Section 2 (n) of the Act of 2013, the same has been fixed as 18 years. Thus, in the instant case, the fact that the trial of the case was pending as on date of coming into force of the Act of 2013 makes it clear that we have to approach this case in accordance with the provisions contained in the Act of 2013 and consequently, the age of juvenility of the petitioner with reference to this case has to be taken as 18 years and not 16 years, the age of juvenility fixed under the Act of 1997, even though the said Act was in force at the time of commission of the alleged occurrence.

16. I am supported in my aforesaid view by the judgment of the Supreme Court rendered in the case titled, ***Hari Ram Vs. State of Rajasthan and Anr.***, reported in (2009) 13 SCC 211, wherein the Supreme Court, after taking into consideration effect of Section 7A and Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (*hereinafter referred to as the "Act of 2000"*), which are in *para materia* with Section 8 and Section 21 of the Act of 2013, came to the conclusion that the provisions of the Act of 2000 have been given retrospective effect and, accordingly, the Court held that a juvenile, who had not completed 18 years on the date of commission of offence was also entitled to the benefits of the Act of 2000, as the provisions of Section 2(k) of the said Act, which is in *para materia* with Section 2(n) of the Act of 2013 had always been in existence even during the operation of 1986 Act. As a corollary to the aforesaid ratio laid down by the Supreme Court, it can be safely held that a juvenile, who had not completed the age of 18 years on the date of commission of offence, was also entitled to the benefits of the Act of 2013, as if the provisions of Section 2(n) of the Act of 2013 had always been in existence even during the operation of the Act of 1997.

17. It has been contended by the learned counsel for the petitioner that even if the provisions contained in the Act of 2013 would be applicable to the case of the petitioner, yet the procedure for determination of the age of the petitioner would be governed by the J&K Juvenile Justice Rules, 2007 (*hereinafter referred to as the "Rules of 2007"*), which have been framed under the Act of 1997. He further contended that the J&K Juvenile Justice (Care and Protection of Children) Rules, 2014, which have been framed under the Act of 2013 would not be applicable to the instant case. We are afraid the contention of the learned counsel for the petitioner cannot be accepted as the same is without any substance and logic. While dealing with the case, we cannot take resort to one statute and adopt the procedure prescribed under the rules framed under another statute, which is no longer in force. Even otherwise, this Court while passing order dated 05.10.2015 has made it very clear that the procedure, which is to be adopted for determination of age of the petitioner has to be as per the rules framed under the Act of 2013. We find no justification for re-opening the said issue or even to take a different view.

18. Having held as above, let us now proceed to determine the merits of the preliminary objections raised by the learned AAG. Section 51 of the Act of 2013 provides for appeals to the Court of Session from an order made by a competent authority under the Act. In the instant case, the order has been made by the learned Sessions Judge, as such, an appeal to the Court of Session becomes out of question.

19. Section 52 of the Act of 2013 provides for revision and the same reads as under:-

“52. Revision-The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit : Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard.”

20. From a perusal of the aforesaid provision, it is clear that the High Court is vested with the power of revision in respect of an order made by any competent authority or the Court of Session for satisfying itself as to the legality and propriety of such an order. The language of Section 52 is identical to the language of Section 397 of the Cr.P.C. Therefore, it can safely be stated that the scope of revisional power of High Court under Section 52 of the Act of 2013 is akin to the scope of revisional jurisdiction of the High Court under Section 397 of the Cr.P.C.

21. In the instant case, the learned 3rd Additional Sessions Judge, Jammu under the directions of this Court was asked to act as an authority to inquire into the claim of the juvenility projected by the petitioner. Its order and proceedings are, therefore, subject to the revisional jurisdiction of the High Court and there cannot be any doubt about the same. The High Court, therefore, is well within its jurisdiction to test the legality and propriety of the order and proceedings conducted by the learned Trial Court in exercise of its revisional jurisdiction.

22. Even otherwise, if the contention of the learned AAG that the report of the learned Trial Court can only be contested by the petitioner by filing the objections thereto and not by filing a revision petition is conceded, then also this Court is well within its jurisdiction to test the legality of the said

report and in fact, the scope of interference in the said report would be larger than the scope of revision. In either eventuality, the doors of the petitioner to make a grievance before this Court against the inquiry report and the findings submitted by the learned Trial Court are open.

23. So far as the second contention of the learned AAG that the petitioner has abandoned his right to question the findings of the learned Trial Court recorded vide order dated 11.01.2007 is concerned, the same is without any merit because this plea was raised by the respondent-State before this Court earlier also and the same has been specifically dealt with by this Court in its order dated 05.10.2015. The argument has been dealt with in para-23 of the aforesaid order, which reads as under:-

“23. We have registered the argument made on behalf of the State that after determination of the question of juvenility by the learned trial court vide its order dated 30.10.2006, accused took part in the trial without assailing the order of the trial court so he cannot be permitted to raise the question afresh at this stage. We, however, cannot agree with this argument because of the importance and sensitivity of the question of juvenility and having regard to the change in legal position with the repeal of the Act of 1997 by the Act of 2013. Even it is presumed that the appellant was above sixteen as at the time of commission of the alleged offence and therefore, not a juvenile under the Act of 1997, the question of juvenility still survives as under the Act of 2013 age of juvenility has been raised to eighteen and it is neither safe nor possible to hold or say on the basis of the proceedings conducted by the trial court that the appellant was more than eighteen at the relevant time. We cannot ignore that as per the ossification test of the appellant got conducted by the I.O. on 19.09.2005 the age of the appellant was something above seventeen years and below nineteen years, as per the birth certificate relied upon the appellant his date of birth is 15.01.1991 and as per the copy of birth register received from Police Station, Kokernag, date of birth of the person entered therein is 12.01.1987. In any case as regards the age of the appellant *vis a vis* the date of commission of offence, this is a borderline case both under the Act of 1997 and the Act of 2013 and proper determination of the question of juvenility was/is indispensable.”

24. The aforesaid order has acquired finality and as such, it is not open to the respondent-State to raise this issue once more.

25. That takes us to the core issue relating to the inquiry report dated 17.03.2016 and the findings recorded therein by the learned Trial Court. As already noted, the learned Trial Court while conducting the inquiry, recorded the statements of a number of witnesses including the father of the petitioner, officials of the School where the petitioner is alleged to have studied upto 7th standard, the police officials touching the contents of the certificate of birth issued by the Police Station, Kokernag as well as the Chowkidar and the officials, who in terms of the provisions of the Registration of Births and Deaths Act, 1969 were supposed to maintain the record with regard to birth of the petitioner.

26. If we have a look at the report of the learned Trial Court, it has, while reaching the conclusion that date of birth of the petitioner is 12.01.1987, essentially relied upon the birth certificate issued by the Police Station, Kokernag and the Age Estimation Report of the Medical Board. So far as the birth certificate issued by the Police Station, Kokernag is concerned, the name of the child to whom it pertains is reflected as Rashid Kumar and his father's name is shown as Mohd. Kumar. As per the challan presented by the police, the name of the petitioner is Mohd. Rashid alias Abdul Rashid S/o Gulam Mohd.

27. This Court vide its order dated 05.10.2015 had specifically pointed out the discrepancy between the name and particulars of the child shown in the birth record and the name and particulars of the petitioner shown in the challan. It was also observed that these aspects of entry in the birth register did not seem to have attracted the attention of the learned Trial Court. We are afraid despite making the aforesaid observations, this aspect of the

matter has not attracted the attention of the learned Trial Court even on the second occasion. In view of the aforesaid specific observations of this Court in its order dated 05.10.2015, it was incumbent upon the learned Trial Court to ascertain as to whether the birth particulars of the child in the copy of the extracts of birth register as produced by the police did actually pertain to the petitioner or not. No evidence in this regard has been collected by the learned Trial Court and it seems it has presumed that Mohd. Kumar S/o Gulam Mohd Kumar is the same person as Rashid Kumar alias Abdul Rashid S/o Gulam Mohd. Without satisfying itself about the identity of the child particulars whereof are mentioned in the birth certificate produced by the police, it was not open to the learned Trial Court to place reliance upon the same.

28. Apart from the above, the learned Trial Court has not even recorded the statements of the members of the Medical Board, who had examined the petitioner while issuing the Age Estimation Report dated 19.02.2016. In the instant case the age estimation tests were conducted upon the petitioner at a stage when he had perhaps crossed the age of 25 years. At that stage, it is difficult to ascertain even the approximate age of a person by ossification tests. Therefore, it was all the more essential for the learned Trial Court to examine and cross-examine the expert witnesses, who had issued the certificate so as to ascertain the expert opinion on these aspects of matter, more so, when the gap between the minimum and maximum age given by the Medical Board was as large as 4 years.

29. There is yet another aspect of the matter, which has escaped the notice of the learned Trial Court while making the inquiry. As already noted, at the time of presentation of the challan, the Investigating Agency had

subjected the petitioner to ossification test and placed on record the certificate dated 19.09.2005. According to the said certificate, the radiological age of the petitioner was more than 17 years and less than 19 years. The said test was conducted more than a decade prior to the test conducted by the Medical Board in the year 2016. At that stage, the petitioner would have been much younger and as such, the tests regarding age estimation conducted upon him in the year 2005 would be more helpful in ascertaining his approximate age as on date of the occurrence. That being the case, the learned Trial Court should have summoned the concerned doctor and examined him, touching the contents of the certificate dated 19.09.2005.

30. After collecting all the aforestated material, the learned Trial Court would have been in a better position to render its finding as regards the age of the petitioner as on date of commission of the alleged offence but unfortunately the learned Trial Court did not take trouble to undertake this exercise and instead recorded its findings on the basis of incomplete material.

31. The learned Trial Court besides doing a sketchy job as regards the inquiry proceeds as pointed out hereinbefore has also rendered certain findings and observations which are perverse to say the least. The learned Trial Court has observed that a person, who does not know the name of his wife, is not expected to remember the date of birth of his child and on this basis, he has discarded the statement of the father of the petitioner. We are afraid the observation of the learned Trial Court in this regard is perverse and contrary to the record. A perusal of the statement of Gulam Mohd. Kumar, father of the petitioner, reveals that he has clearly stated that the name of his wife as Jana. It appears that on account of lack of knowledge of Urdu language, the learned trial

Judge has wrongly translated the Urdu version of the statement thereby landing himself into a gross error.

32. Not only this, the learned Trial Court has, while doubting the authenticity of the date of birth certificate of the petitioner issued by the School, observed that there is overwriting in Serial Nos. 230 to 239 on the names of the students in the register of Middle School, Takia Magam and that there is interpolation in the Serial Nos. 222 to 224 and missing Serial No. 223 in the said register. It has further been observed that at Serial No. 235, there has been some insertion with a further observation that the original Admission Register is missing and that there is overwriting in the name in the Attendance Register and Admission Register.

33. We have examined the original Admission Register of the School, which is on record of the Trial Court. It bears a certificate on its first page, according to which the same has been maintained w.e.f. 06.08.1996 and prior to that, the record was not available because the same was gutted in fire. As per the birth certificate issued by the said School in respect of the petitioner, he was admitted to School on 01.05.1997. His name figures at Serial No. 235 of the register. This means that the record prior to 06.08.1996, which stands gutted is not relevant to the case of the petitioner. We find that there is no interpolation or insertion at Serial No. 235 of the register, where the name of the petitioner figures. We do not find any interpolation or missing numbers in the said Admission Register, reference whereof has been made by the learned Trial Court in para-46 of its report. All the observations made by the learned Trial Court in this regard are contrary to record and, therefore, the conclusions

drawn by the learned Trial Court on the basis of the aforesaid observations is definitely not in accordance with law, and as such, not sustainable.

34. Having regard to the foregoing discussion, we are of the firm view that job done by the learned Trial Court while making the impugned inquiry report and returning the findings thereon is sketchy, incomplete and far from satisfactory. The findings recorded thereon and the observations made therein, reference whereof has been given herein before, are perverse and against the record. The same are, therefore, liable to be set aside.

35. However, before reaching a definite conclusion as regards the age of the petitioner as on date of the occurrence, there is a need to collect further evidence and to ascertain precisely as to whether the certificate produced by the police, depicting the date of birth of the petitioner as 12.01.1987 actually pertains to him or to some other person. For this purpose, while setting aside the findings of the learned Trial Court made in the impugned inquiry report, we remand the case back to the learned Trial Court with the following directions:-

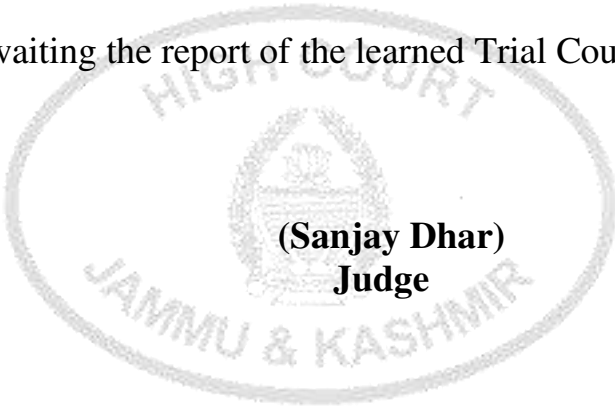
- (i) To ascertain whether the certificate produced by the Station House Officer, Police Station, Kokernag, depicting the age of the petitioner as 12.01.1987 does actually pertain to the petitioner or to any other person keeping in view the fact that there is discrepancy in the name and particulars of the child mentioned in the said certificate and the name and particulars of the petitioner, as given in the challan.
- (ii) To record the statements of the members of the Medical Board, who have examined the petitioner at the time of issuing Age Assessment Report dated 19.02.2016 and also to record the statement of the doctor, who has conducted radiological examination of the petitioner at the time of issuing certificate dated 19.09.2005.

36. The learned Trial Court shall be at liberty to collect any other relevant evidence, that would help it in ascertaining the actual or approximate

age of the petitioner at the time of commission of the alleged occurrence. After undertaking the aforesaid exercise, the learned Trial Court shall without getting influenced with the findings recorded in the report dated 17.03.2016, furnish its report with regard to determination of age of the petitioner as on date of occurrence to this Court within a period of two months from the date, a certified copy of this order is made available to the learned Trial Court.

37. In view of the above, the instant revision petition stands *disposed of*. The original record of the trial court be sent back with a direction that the same be returned to this Court along with the report of inquiry.

38. The main appeal, i.e., CRA No. 23/2014 be listed for further proceedings for awaiting the report of the learned Trial Court on 09.07.2021.



(Sanjay Dhar)
Judge

(Tashi Rabstan)
Judge

JAMMU
31.03.2021
(Ram Krishan)

Whether the order is speaking?	Yes
Whether the order is reportable?	Yes