RAM DEO CHAUHAN @ RAJ NATH

v.

STATE OF ASSAM

MAY 10, 2001

[K.T. THOMAS, R.P. SETHI AND S.N. PHUKAN, JJ.]

Constitution of India, 1950—Article 137—Review—Scope of—In criminal cases—Held, the power is subject to the provisions of law made by parliament or any rules made under Article 145 of the Constitution—The mere fact that two views on the same subject are possible, is no ground to review the earlier judgment passed by a Bench of the same strength—Civil Procedure Code, 1908—Order XLVII Rule 1—Supreme Court Rules, 1966—Order XL rules 1 & 5.

Articles 72 and 161—Power to pardon—Held, the powers are absolute and cannot be fettered by any statutory provision.—Criminal Procedure Code, 1973—Section 432, 433 and 433A.

Penal Code, 1860—Section 302—Juvenile Justice Act, 1986—Section 22(1) & 8—Death sentence—Review of—On the ground of petitioner being juvenile on the relevant date—Plea raised for the first time—Petitioner not proved to be juvenile on the relevant date—Held, the sentence cannot be altered—Criminal Procedure Code, 1973—Section 27.

Criminal Procedure Code, 1973

Sections 235 and 309(2) Third proviso (as amended) by Act 45 of 1978)—Adjournment of case—To enable the accused to show cause against the sentence proposed—Requirement of—Held, not required—Yet, in appropriate cases, the Court can grant adjournment, particularly if proposed sentence is sentence of death—Opportunity of hearing to the accused—Necessity of—Legal position reiterated and directions issued.

Section 432—Remission of sentence—Held, does not mean aquittal, and does not amount to interference with due and proper course of justice.

Sections 433 & 433A—The power to commute a sentence of death is independent of Section 433A.—The restriction under Section 433A of the

Code comes into operation only after power under Section 433 is exercised.

Criminal Trail—Age of the accused—Determination of—Reliance on text books, medical jurisprudence and toxicology—Held, too much reliance cannot be placed on them—Evidence Act, 1872.

Words & Phrases—'Remit'—Meaning of—In the context of Section 432 Cr.P.C.

Against the judgment of Supreme Court confirming the death sentence awarded by the Trial Court and the High Court, petitioner has preferred the review petition.

The petitioner contended that he could not be sentenced in either imprisonment or death sentence, because he was a juvenile within the meaning of Section 2(h) of Juvenile Justice Act, 1986. Notice was issued on the limited point of sentence.

The plea of the petitioner being juvenile was raised for the first time before this Court, and was not raised at the time of investigation, inquiry and trial, or in his application for grant of bail, or in his confessional statement recorded by the Magistrate, or in the memo of appeal filed in the High Court.

Prosecution tried to establish that the petitioner was not a juvenile at the relevant date on the basis of the supervision notes of the Superintendent of Police, the confessional statement of the petitioner, statement of the accused under Section 161 Cr.P.C., evidence of the father of the petitioner, the evidence of PW-4, and the sheet on which the statement of the accused was recorded by the trial Court under Section 235 Cr.P.C.

The petitioner contended that the whole trial proceedings were liable to be quashed, as he could not have been tried by a court other than the juvenile court as per sections 23 and 24 of the Juvenile Justice Act; and that the trial court wrongly held that he was more than 20 years of age; and that the evidence on record required re-examination as there were numerous inconsistencies and contradictions *viz.* as per the school admission register, the age of the petitioner was 11 months short of 16 years on the relevant date and as per the opinion of the radiological expert the petitioner was within the range of 20 and 21 years on the date of examination and as such within 15 and 16 years on the relevant date; as the marginal error in age ascertained by radiological examination is two years at either side, the

benefit of which should go to the accused; and that the mandate of Section 235 Cr.P.C., was violated as the judgment was pronounced on the same day when the conviction was recorded. A

As regards the necessity to afford opportunity of hearing to the accused on the question of sentence, reiterating the legal position, the following directions were issued by the Court : B

1. When the conviction is under Section 302 IPC (with or without the aid of Section 34 or 149 or 120B of IPC) if the Sessions Judge does not propose to impose death penalty on the convicted person it is unnecessary to proceed to hear the accused on the question of sentence. Section 235(2) of the Code will not be violated if the sentence of life imprisonment is awarded for that offence without hearing the accused on the question of sentence. C

2. In all other cases the accused must be given sufficient opportunity of hearing on the question of sentence. D

3. The normal rule is that after pronouncing the verdict of guilty the hearing should be made on the same day and the sentence shall also be pronounced on the same day.

4. In cases where the Judge feels or if the accused demands more time for hearing on the question of sentence (especially when the Judge propose to impose death penalty) the proviso to Section 309(2) is not a bar for affording such time. E

5. For any reason the court is inclined to adjourn the case after pronouncing the verdict of guilty in grave offences the convicted person shall be committed to jail till the verdict on the sentence is pronounced. Further detention will depend upon the process of law. F

Dismissing the petition by majority, without prejudice to the right of the petitioner to get the benefit under Sections 432, 433 and 433A of the Code of Criminal Procedure, the Court G

HELD : Per Sethi, J.

1.1. The grounds urged in the petition and at the Bar do not make out a case for review. In the guise of this petition, the petitioner has sought the reappraisal of the whole evidence, firstly to hold him not guilty and even if H

A he is found guilty to give him benefit of the Juvenile Justice Act. [684-H; 685-A]

1.2. The mere fact that two views on the same subject are possible, is no ground to review the earlier judgment passed by a Bench of the same strength. Article 137 of the Constitution of India, 1950 empowers this Court B to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Supreme Court Rules, 1966 made in exercise of the powers under Article 145 of the Constitution prescribe that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Civil Procedure Code, 1908. C Under Order 40 Rule 1 of the Supreme Court Rules no review lies except on the ground of error apparent on the face of the record in criminal cases. Order 40 Rule 5 of the Supreme Court Rules provides that after an application for review has been disposed of, no further application shall be maintained in the same matter. [681-E; 682-D-E; 683-A-B]

D *Lily Thomas* v. *Union of India and Ors.*, JT (2000) 5 SC 617; *M/s Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi,* AIR (1980) SC 674; *Javed Ahmed Abdul Hamid Pawala* v. *State of Maharashtra,* [1985] 2 SCR 8; *State of Orissa* v. *Titaghur Paper Mills,* AIR (1985) SC 1 293; *Union of India* v. *Godfrey Philips India Ltd.,* [1985] Suppl. 3 SCR 123; *R.S. Nayak* v. *A.R. Antulay,* AIR (1984) SC 684; *Prem Chand Garg* v. *Excise Commissioner* E *U.P. Allahabad,* AIR (1963) SC 996; *Naresh Shridhar Mirajkar* v. *State of Maharashtra,* [1966] 3 SCR 744 and *Smt. Ujjam Bai* v. *State of U.P.,* [1963] 1 SCR 778, referred to.

2.1. The petitioner was not a juvenile within the meaning of the Juvenile Justice Act; not did he seriously claim to be a juvenile for the purposes of F getting the benefit of Section 22 of the Act. The judgment of the trial Court and the High Court cannot be assailed on the ground of having been passed in violation of the mandate of law. From the evidence produced and the material placed before the Courts below, there is not an iota of doubt to hold that the petitioner was a child or near or about the age of being a child within G the meaning of the Juvenile Justice Act or Children Act. He is proved to be major at the time of the commission of the offence. [689-D; 694-G]

2.2. The plea of the petitioner being juvenile is not only an after-thought but a concoction of his imagination at a belated stage to thwart the course of justice by having resort to wrangles of procedures and technicalities H of law. In case of the petitioner, the investigating officer, the Magistrate

before whom the accused was produced, the Magistrate who recorded his confessional statement and the Sessions Court to whom the accused was committed did not find the accused a juvenile or a child. Such Magistrate and Court were in a better position to form an opinion regarding the age of the accused who had admittedly appeared before them as they had the opportunity to see and observe him. [687-B-D] A B

State of Haryana v. *Balwant Singh,* [1993] Suppl. 1 SCC 409, relied on.

2.3. A harmonious reading of the Juvenile Justice Act, particularly Section 8 and Section 27 Cr.P.C., would show that whenever any delinquent juvenile, accused of an offence, irrespective of the punishment imposable by law, is produced before a Magistrate or a Court, such Magistrate or the court, after it is brought to its notice or is observed by the Magistrate or the Court itself, that the accused produced before it was under the age of 16 years, shall refer the accused to the Juvenile Courts, if the Act is applicable in the State and the Courts have been constituted, or otherwise refer the case to the Court of Chief Judicial Magistrate who will deal with the matter in accordance with the provisions of law. In the instant case, no one - the investigating agency, the Magistrate the Court the accused - felt the necessity of application of the provisions either of Section 27 of Criminal Procedure Code or the provisions of the Juvenile Justice Act, particularly Section 8 thereof. [686-G-H; 687-A-B] C D E

2.4. Too much reliance cannot be placed upon text books, on medical jurisprudence and toxicology while determining the age of the accused. In this vast country with varied latitude, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform. The doctor has opined the age of the accused to be admittedly more than 20 years and less than 25 years. The statement of the doctor is no more than an opinion. The Court has to base its conclusions upon all the facts and circumstances disclosed on examining the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. [694-D-F] F G

Jaya Mala v. *Home Secretary, Government of Jammu & Kashmir and Ors.,* [1982] 2 SCC 538, distinguished. H

A 2.5. The manner in which the school admission register has been maintained does not inspire confidence of the Court to put any reliance on it. The entries made in such a register cannot be taken as a proof of age of the accused for any purpose. [693-D-E]

3. The mandate of the legislature is clear and unambiguous that no B adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him. In a case punishable with death or imprisonment for life, there is no difficulty for the Court where the sentence proposed to be imposed is alternative sentence of life imprisonment but if it proposes to award the death sentence, C it has discretion to adjourn the case in the interests of justice. Despite the bar of third proviso to sub-section (2) of Section 309 Cr.P.C., the Court, in appropriate cases, can grant adjournment for enabling the accused persons to show cause against the sentence proposed on him particularly if such proposed sentence is sentence of death. In all cases where a conviction is recorded in cases triable by the Court of Sessions or by Special Courts, the D Court is enjoined upon to direct the accused convict to be immediately taken into custody, if he is on bail, and kept in jail till such time the question of sentence is decided. After the sentence is awarded, the convict is to undergo such sentence unless the operation of such sentence awarded is stayed or suspended by a competent Court of jurisdiction. Such a course is necessitated E under the present circumstances prevalent in the country and is in consonance with the spirit of law. A person granted bail has no right to insist to remain at liberty on the basis of the orders passed in his favour prior to his conviction. [697-B-E]

F *Muniappan* v. *State of Tamil Nadu,* [1981] 3 SCC 11 and *Malkiat Singh and Ors.* v. *State of Punjab,* [1991] 3 SCC 341, distinguished.

State of Maharashtra v. *Sukhdev Singh and Anr.,* [1992] 3 SCC 700 and *Allauddin Mian and Ors.* v. *State of Bihar,* [1989] 3 SCC 5, referred to.

G Per Phukan, J. (concurring)

1. Power of review is a restricted power which authorises the Court which passed the order sought to be reviewed, to look over and go through the order, not in order to substitute a fresh or a second order, but in order to correct it or improve it because some materials which it ought to have H considered has escaped its consideration. [698-H; 699-A-B]

2.1. The accused is not remediless. Sections 432, 433 and 433A of the Code of Criminal Procedure and Articles 72 and 161 of the Constitution deal with pardon. The power under Article 72 and Article 161 of the Constitution is absolute and cannot be fettered by any statutory provision such as Sections 432, 433 and 433A of the Code or by any Prison Rules. [698-C-E] A

2.2. There is no obstacle in the way of the President or Governor, as the case may be in remitting the sentence of death. A remission of sentence does not mean acquittal. The release of the prisoners condemned to death in exercise of the powers conferred under Section 432 of the Criminal Procedure Code and Article 161 of the Constitution does not amount to interference with due and proper course of justice, as the power of the Court to pronounce upon the validity, propriety and correctness of the conviction and the sentence remains unaffected. Similar power as those contained in Section 432 of the Code or Article 161 of the Constitution can be exercised before, during or after the trail. The power exercised under Section 432 of the Code is largely an executive power vested in the appropriate Government and by reducing the sentence, the authority concerned thereby modify the judicial sentence. The section confines the power of the Government to the suspension of execution of the sentence or the remission of the whole or any part of the punishment. Section 432 of the Code gives no power to the Government to revise the judgment of the Court. It only provides power of remitting the sentence. Remission of punishment assumes correctness of the conviction and only reduces punishment in part or whole. The word 'remit' as used in Section 432 is not a term of art. Some of the meaning of the word 'remit' are 'to pardon, to refrain from inflicting, to give up'. [698-F-H; 699-A-B] B C D E

2.3. The power to commute a sentence of death is independent of Section 433A. The restriction under Section 433A of the Code comes into operation only after power under Section 433 is exercised. Section 433A is applicable to two categories of convicts: (a) those who could have been punished for sentence of death and (b) those whose sentence have been converted into imprisonment for life under Section 433. Section 433A does not violate Article 20(1) of the Constitution. [699-C] F

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Mura Ram v. *Union of India,* [1981] 1 SCC 106, referred to.

Per Thomas, J (dissenting)

1. Power of Supreme Court as envisaged under Article 137 of the Constitution is wider than the review jurisdiction conferred by other statutes H

A on the Court. Article 137 empowers the Supreme Court to review any judgment pronounced or order made, subject to the provisions of any law made by Parliament or any rule made under Article 145 of the Constitution. [702-B-C]

P.N. Iswara Iyer v. *Registrar, Supreme Court of India,* [1980] 4 SCC B 680 and *Suthendraraja* v. *State,* [1999] 9 SCC 323, referred to.

2.1. When the possibility of the petitioner having been a juvenile on the relevant date cannot be excluded from the conclusion by adopting reasonable standards, the interdict contained in Section 22(1) of the Juvenile Act cannot be bypassed for awarding death penalty to the petitioner so long as the death C penalty is permitted to survive Article 21 of the Constitution, only if the lesser alternative can be foreclosed unquestionably. In other words, if the age of the petitioner cannot be held to be unquestionably above 16 on the relevant date its corollary is that the lesser sentence also cannot unquestionably be foreclosed. [707-G-H]

D *Bachan Singh* v. *State of Punjab,* [1980] 2 SCC 684, relied on.

2.2. The fact that the trial Court and the High Court did not accept the plea of the petitioner on the score of his juvenility, or the fact that this Court did not upset such finding, is not enough to hold that petitioner's plea regarding his juvenility as on the crucial date does not survive for E consideration. [704-D]

2.3. The Court cannot act on any of the materials projected by the prosecution for the purpose of reaching a conclusion regarding the age of the petitioner as on the relevant date. The exercise of hatching or brewing up possible date or year of birth with the help of scattered answers given by F the father of the petitioner, all during cross-examination, is a very unsound course to be adopted. At any rate such an exercise cannot be sustained to the detriment of the person concerned. Nor can the Court rely on the testimony of PW-4 who said that the accused told him in 1991 that his age was 20. Such a statement cannot be regarded as reaching anywhere near the G proximity of reliability for fixing up the correct age of a person. The statement recorded under Section 161 of the Code is not permitted by law to be used except for contradicting the author of the statement. Hence it is impermissible to look into that material also. Unless the person, who filled up the prefatory columns on the sheet on which statement of the accused was recorded under Section 235 of the Code, is examined for showing how he gathered the H information regarding all such columns, the entries therein cannot be

regarded as legal evidence. At any rate, the Court cannot proceed on a presumption that such columns were filled up by the accused himself. A
[706-B-E]

2.4. The evidence of the court witness, the doctor, is a material, which creates reasonable doubts as to the possibility of the petitioner having been below the age of 16 on the relevant date. Of course the doctor's estimate of B age is not a sturdy substitute for proof as it is only his opinion. But such opinion of an expert cannot be side lined in the realm where the Court gropes in dark to find out what would possibly have been the age of a citizen for the purpose of affording him a constitutional protection. In the absence of all other acceptable materials, if such opinion points to a reasonable possibility C regarding the range of his age, it has certainly to be considered.
[707-A; F-G]

3. The sentence cannot be altered on the reasoning that the trial Court did not adjourn the proceedings, after pronouncing the conviction, for the purpose of providing the convicted person time to reflect on the question of D sentence. The trial judge chose to pronounce the sentence on the same day of pronouncing the verdict of conviction. When the Code of Criminal Procedure was amended in 1978 (by Act 45 of 1978) a proviso was introduced to sub-section (2) of Section 309 of the Code by which an interdict has been added that "no adjournment shall be granted for the purpose only of enabling the accused persons to show cause against the sentence proposed to be E imposed on him." The said proviso does not make a distinction between offences punishable with death or imprisonment for life and the other offences, in relation to the application of the said proviso. The proviso thus reflects the parliamentary concern that the rule in all cases must be that sentence shall be passed on the same day of pronouncement of judgment in criminal F cases as far as possible, and perhaps by way of exception the said rule can be relaxed by adjourning the case to another day for passing orders on the sentence. [699-G-H; 700-A-C]

State of Maharashtra v. *Sukhdev Singh and Anr.*, [1992] 3 SCC 700, relied on. G

Allauddin Mian and Ors. v. *State of Bihar*, [1989] 3 SCC 5 and *Malkiat Singh and Ors.* v. *State of Punjab*, [1991] 4 SCC 341, distinguished.

Muniappan v. *State of Tamil Nadu*, [1981] 3 SCC 11, referred to.

CRIMINAL APPELLATE JURISDICTION : Review Petition (Crl.) H

A No. 1105 of 2000.

(Under Article 137 of the Constitution of India)

IN

CRIMINAL APPEAL NO. 4 OF 2000

B

From the Judgment and Order dated 1.2.99 of the Gauhati High Court in Crl. A. No. 109(J)/98 Crl. D.R. No. 1/98.

S. Muralidhar for the Petitioner/Appellant.

C Sunil Kr. Jain, Amitesh Lal for M/s. Jain Hansaria and Co., for the Respondent.

The Judgments of the Court were delivered by

SETHI, J. Equating him with a beast, this Court [2000] 7 SCC 455] confirmed the death sentence awarded to the petitioner by the trial court and D the High Court on proof of his having caused the death of four persons of a family including ladies and a child of two and a half years of age. Confirming the death sentence this Court had held:

> "We are satisfied that the present case is an exceptional case which warrants the awarding of maximum penalty under the law to the E accused/appellant. The crime committed by the appellant is not only shocking but it has also jeopardised the society. The awarding of lesser sentence only on the ground of the appellant being a youth at the time of occurrence cannot be considered as a mitigating circumstance in view of our findings that the murders committed by F him were most cruel, heinous and dastardly. We have no doubt that the present case is the rarest of the rare requiring the maximum penalty, imposable under law."

Not satisfied with the murder of human beings, the petitioner has now tried to scuttle the process of law and thwart the course of Justice by resort G to having recourse of seeking review of sentence on imaginative and concocted grounds. He has contended that as he was a juvenile within the meaning of Section 2(h) of the Juvenile Justice Act, he could not be sentenced to any imprisonment much less the death sentence. In support of his contentions the learned counsel appearing for the petitioner has relied upon a host of authorities, wherein keeping in view the age of the accused and H treating them as child, this Court had passed orders for setting those accused

persons at liberty. A

After issue of notice, a two-judge Bench of this Court held that the question of conviction of the petitioner under Section 302 of the IPC cannot be re-opened. Taking note of the contention of the learned counsel for the petitioner that the accused was juvenile at the appropriate time and there was prohibition regarding the sentence to be imposed on him, the review petition B was directed to be considered for that limited purpose only. As the question was important, the matter was referred to a larger Bench.

Heard the learned counsel appearing for the parties at length and critically examined the whole record in the case for appreciating the C submissions made on behalf of the petitioner who has been awarded the death sentence.

This Court considered the scope of review and the limitations imposed on its exercise under Article 137 of the Constitution of India in *Lily Thomas* v. *Union of India & Ors.*, JT [2000] 5 SC 617 and held: D

> "The dictionary meaning of the word "review" is the act of looking, offer something again with a view to correction or improvement. It cannot be denied that the review is the creation of a statute. This Court in *Patel Narshi Thakershi & Ors.* v. *Pradyunmansinghji Arjunsinghji,* AIR (1970) SC 1273 held that the power of review is not E an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before F justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice nothing would preclude the Court from rectifying the error. This Court in *S. Nagaraj & Ors. etc.* v. *State of Karnataka & Anr. etc.* [1993] Supp. 4 SCC 595 G held:
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> > "Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of H

A decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or
B miscarriage of justice. In *Raja Prithwi Chand Law Choudhury* v. *Sukhraj Rai,* AIR (1941) FC 1 the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords.
C The Court approved the principle laid down by the Privy Council in *Rajunder Narain Rae* v. *Bijai Govind Singh,* (1836) 1 Moo PC 117 that an order made by the Court was final and could not be altered:

'...nevertheless, if by misprision in embodying the judgments, by
D errors have been introduced, these Courts possess, by Common Law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in.... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further,
E and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies.'

Basis for exercise of the power was stated in the same decision
F as under:

'It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been
G heard and an order has been inadvertently made as if the party had been heard.'

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed
H the substantive power to rectify or recall the order passed by

this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength.

This Court in *M/s. Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi,* AIR (1980) SC 674 considered the powers of this Court under Article 137 of the Constitution read with Order 47 Rule 1 CPC and Order 40 Rule 1 of the Supreme Court Rules and held:

"It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. *Sajjan Singh* v. *State of Rajasthan,* [1965] 1 SCR 933 at p.948. For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing. *G.L. Gupta* v. *D.N. Mehta,* [1971] 3 SCR 748 at p.760. The Court may also reopen its judgment if a manifest wrong has been done and

A it is necessary to pass an order to do full and effective justice. *ON Mohindroo* v. *Dist. Judge, Delhi,* [1971] 2 SCR 11 at p.27. Power to review its judgments has been conferred on the Supreme Court by Art.137 of the Constitution, and that power is subject to the provisions of any law made by Parliament or the rules made under Art.145. In a civil proceeding, an application for B review is entertained only on a ground mentioned in O. XLVII, Rule 1 of the Code of Civil Procedure and in a criminal proceeding on the ground of an error apparent on the face of the record. (Order XL, R.1, Supreme Court Rules, 1966). But whatever the nature of the proceeding, it is beyond dispute that a review C proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except 'where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility'. *Chandra Kanta* v. *Sheikh Habib*, [1975] 3 SCR 935."

D Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Supreme Court Rules made in exercise of the powers under Article 145 of the Constitution prescribe that in civil cases, review lies on any of the ground specified in Order 47 Rule 1 of the Code of Civil Procedure which provides:

E

"Application for review of judgment -(1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which, no appeal has been preferred.

F

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge G or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the H decree or made the order."

Under Order 40 Rule 1 of the Supreme Court Rules no review lies except on the ground of error apparent on the face of the record in criminal cases. Order 40 Rule 5 of the Supreme Court Rules provides that after an application for review has been disposed of no further application shall be entertained in the same matter.

In *A.R. Antulay's* case (supra) this Court held that the principle of English Law that the size of the Bench did not matter has not been accepted in this country. In this country there is a hierarchy within the Court itself where larger Benches overrule smaller Benches. This practice followed by the Court was declared to have been crystalised as a rule of law. Reference in that behalf was made to the judgments in *Javed Ahmed Abdul Hamid Pawala* v. *State of Maharashtra,* [1985] 2 SCR 8; *State of Orissa* v. *Titaghur Paper Mills,* AIR (1985) SC 1293 and *Union of India* v. *Godfrey Philips India Ltd.,* [1985] Supp. 3 SCR 123. In that case the Bench comprising seven judges was called upon to decide as to whether the directions given by the Bench of this Court comprising five judges in the case of *R.S. Nayak* v. *A.R. Antulay,* AIR (1984) SC 684 were legally proper or not and whether the action and the trial proceedings pursuant to those directions were legal and valid. In that behalf reference was made to the hierarchy of Benches and practice prevalent in the country. It was observed that Court was not debarred from reopening the question of giving proper directions and correcting the error in appeal if the direction issued in the earlier case on 16th February, 1984 were found to be violative of limits of jurisdiction and that those directions had resulted in deprivation of fundamental rights of a citizen granted by Articles 14 and 21 of the Constitution of India. The Court referred to its earlier judgment in *Prem Chand Garg* v. *Excise Commissioner U.P., Allahabad,* AIR (1963) SC 996; *Naresh Shridhar Mirajkar* v. *State of Maharashtra,* [1966] 3 SCR 744 = AIR (1967) SC 1 and *Smt. Ujjam Bai* v. *State of U.P.,* [1963] 1 SCR 778 = AIR (1962) SC 1621 and concluded that the citizens should not suffer on account of directions of the Court based upon error leading to conferment of jurisdiction. The directions issued by the Court were found on facts to be violative of the limits of jurisdiction resulting in the deprivation of the fundamental rights guaranteed to the appellant therein. It was further found that the impugned directions had been issued without observing the principle of *audi alteram* partem.

A It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of B review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised. However, this Court in exercise of its powers under Article 136 or Article 32 of the Constitution and C upon satisfaction that the earlier judgments have resulted in deprivation of fundamental rights of a citizen or rights created under any other statute, can take a different view notwithstanding the earlier judgment."

In the instant case, the review is sought on the ground that the petitioner was juvenile on the date of commission of the offence. According to the learned D counsel appearing for the petitioner it is contended that as per school records the date of birth of the petitioner was 1.2.1977. He was 15 years 1 month and 7 days old on the date of occurrence. According to him the medical examination conducted on 23rd December, 1997 revealed that the accused was 15 years two months and 15 days old on the relevant date. It is contended that the E petitioner could not have been tried by a court other than the juvenile court as per Sections 23 and 24 of the Juvenile Justice Act, 1986 (hereinafter referred to as "the Act"). As the trial was concededly not conducted by a juvenile court, the whole proceedings were liable to be quashed. It is further contended that the trial court wrongly held the petitioner to be more than 20 years of age and the High Court erred in not deciding the question of age F despite concession made by the counsel appearing for the petitioner. It is submitted that the counsel of the accused could not have sacrificed the interest of the accused and should have insisted for a finding from the court regarding his being a child or a juvenile. It is further submitted that the evidence on record requires re-examination as allegedly there are numerous G inconsistencies and contradictions, the benefit of which is to go to the accused. Though not pleaded, yet the learned counsel argued that as the judgment was pronounced on the same day when the conviction was recorded, the mandate of Section 235 of the Code of Criminal Procedure (hereinafter referred to as "the Code") stood violated.

The grounds urged in the petition and at the Bar do not make out a case

for review. In the guise of this petition, the petitioner has sought the re-appraisal of the whole evidence firstly to hold him not guilty and even if he is found guilty to give him the benefit of the Act. The contentions raised and the prayer made are admittedly beyond the scope of review. This petition can be dismissed only on this ground. However, being the case of death sentence, we have decided to consider the whole matter in depth to ascertain as to whether the petitioner is entitled to the benefit of the Act or not. We have further opted to consider that even if he is not proved to be juvenile, can he be given the benefit of his age on the ground of his allegedly being on the borders of the age contemplated under the Act for the purposes of awarding him the alternative sentence of imprisonment for life.

A perusal of the record shows that during the investigation, inquiry and trial, though represented by Senior Counsel, no plea was ever raised regarding the petitioner being juvenile and the case being governed by the provisions of the Act. Only at the time of arguments, plea regarding the accused being Juvenile was raised on the basis of defence evidence and the statement of Dr. B.C. Roy Medhi. However, such evidence appears to have been brought on record for the purposes of avoiding the death sentence and not for the applicability of the Act. Even in his application for grant of bail under Section 437 of the Code, the petitioner had not raised the plea of being under the age of 16 years entitling him bail under the first proviso to Sub-section (1) of Section 437 of the Code. Neither in his confessional statement, recorded by the Magistrate, nor in the memo of appeal filed in the High Court, such plea was ever raised.

The Act has been enacted to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to and disposition of delinquent juveniles. The object of the Act is to provide extraordinary procedure for offences alleged to be committed by a child/juvenile and punishment thereof. The Act is a complete Code in itself. "Juvenile" has been defined to mean a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years and "delinquent juvenile" means a juvenile who has been found to have committed an offence. Section 5 of the Act authorises the State government for constitution of juvenile courts for exercising the powers and discharging the duties conferred on such courts in relation to delinquent juvenile under the Act. Section 8 of the Act provides that when any Magistrate not empowered to exercise the power of a Board or a Juvenile Court under this Act is of the opinion that a person brought before him under any of the

A provisions of the Act is a juvenile, he shall record such opinion and forward the juvenile and the record of the proceeding to the competent authority having jurisdiction over the proceeding. Such a power can be exercised by the Magistrate either on the complaint made to it or its own observations regarding the age of the accused appearing before him. In the absence of an order of a Magistrate, the competent authority under the Act cannot hold B inquiry for the purpose of determining whether the person brought before it is a juvenile or not.

In the instant case when the accused was produced before the Magistrate, powers under Section 8 were not exercised, obviously upon C satisfaction of the Magistrate that the accused did not appear to be a juvenile. No plea appears to have been taken by the accused of his being a child/ juvenile either before the Magistrate or before the court, with the result that no inquiry, as contemplated under the Act, was ever held about his age. Even in the absence of an inquiry under the Act, the Sessions Court, after the case is committed to it has the power to make inquiry and determine the age of D the accused if it considers it necessary in the interests of justice or a prayer is made in that behalf. The word "inquiry" appearing in sub-section (2) of Section 8 means inquiry under the Act and not inquiry under Section 2(g) of the Code.

E Chapter III of the Code deals with the powers of the Criminal Courts. Section 26 specifies the courts by which various offences are triable. Section 27 deals with the jurisdiction of the criminal courts in case of juvenile. It provides that when any offence not punishable with death or imprisonment for life, committed by any person, who, at the date when he appears or is brought before the court is under the age of sixteen years, such accused can F be tried by the court of Chief Judicial Magistrate or by any court specially empowered under the Children Act or any other law for the time being in force providing for the treatment, training or rehabilitation of the youthful offenders. The Act was enacted in the year 1986, without incorporating any amendment in Section 27 of the Code. A harmonious reading of the Act, particularly G Section 8 and Section 27 of the Code would lead us to hold that whenever any delinquent juvenile, accused of an offence, irrespective of the punishment imposable by law, is produced before a Magistrate or a court, such Magistrate or the court, after it is brought to its notice or is observed by the Magistrate or the court itself that the accused produced before it was under the age of 16 years, shall refer the accused to the Juvenile Courts if the Act is applicable H in the State and the courts have been constituted or otherwise refer the case

to the Court of Chief Judicial Magistrate who will deal with the matter in accordance with the provisions of law. As noticed earlier, neither the investigating agency, nor the Magistrate or the Court or the accused felt the necessity of application of the provisions either of Section 27 of the Code or the provisions of the Act, particularly Section 8 thereof.

In the case of the petitioner, it appears that the investigating officer, the Magistrate before whom the accused was produced, the Magistrate who recorded his confessional statement and the Sessions Court to whom the accused was committed did not find that the accused was a juvenile or a child. Such Magistrate and court were in a better position to form an opinion regarding the age of the accused who had admittedly appeared before them as they had the opportunity to see and observe him. There is no doubt in our mind that the plea of the petitioner being the juvenile is not only an after-thought but a concoction of his imagination at a belated stage to thwart the course of justice by having resort to wrangles of procedures and technicalities of law.

In a case where the accused had not raised the plea of his being a child/ Juvenile either before the committal court, or the trial court, in appeal the High Court basing merely on an entry made in the statement recorded under Section 313 of the Code, wherein his age was mentioned as 17 year, concluded that he was a child. Setting aside the Judgment of the High Court in *State of Haryana* v. *Balwant Singh,* [1993] Supp. 1 SCC 409 this Court held:

> "We have gone through the records carefully. It appears that the respondent took his trial before the trial court only on being committed by the Magistrate. It may be noticed that the age of the respondent before the trial court even at the stage of framing the charge was given at 17 years. Evidently, the Magistrate before whom the respondent was brought, was not satisfied that the respondent was a child within the definition of word 'child' under the Haryana Children Act. Admittedly, neither before the committal court nor before the trial court, no plea was raised on behalf of the respondent that he was a child and that he should not have been committed by the Magistrate and thereafter tried by the Sessions court and that he ought to have been dealt with only by the court of Juveniles. When it is not the case of the respondent that he was a child both before the committal court as well as before the trial court, it is very surprising that the High Court, based merely on the entry made in Section 313 statement mentioning the age of the respondent as 17 has concluded that the

A respondent was a 'child' within the definition of the Act on the date of the occurrence though there was no other material for that conclusion. This observation of the High Court, in our considered view, cannot be sustained either in law or on facts. Hence, we set aside that finding of the High Court that the respondent was a 'child'."

B On the contrary, in the instant case, the Supervision Notes (dated 9.3.1992 to 12.3.1992) of Shri NM APS Additional Superintendent of Police, Morigaon, Assam, who was supervising the investigation, noted Ram Deo Chauhan accused to be of about 20 years of age. In the confessional statement of the accused recorded on 27th March, 1992 his age is mentioned as 20 C years. Such age appears to have been either disclosed by the accused himself or observed by the court recording the statement and is no way near the age of a juvenile prescribed under the Act. In Exhibit 5, page 128, the Magistrate has recorded, "Statement of accused, aged about 20 years made in the Assamese language".

D In his statement recorded by the trial court on 31st March, 1998, the petitioner gave or the court observed his age as 25 years 6 months as on 20th September, 1997, which shows that he was more than 20 years of age on the date of occurrence, concededly not near or about the age of juvenile as defined under the Act.

E Dealing with the arguments of the petitioner being a juvenile, though raised at a belated stage, the trial court dealt with the question of his age from paras 47 to 62 of its judgment and concluded:

> "As such, in my view, he was not below 16 years of age at the time of alleged commission of the crime and he was not a juvenile to attract F the provisions of Juvenile Justice Act, 1986."

The High Court is also shown to have looked into the statements of Firato Chauhan (DW 1) Satnarayan Jadav (DW 2) besides Dr. B.C. Roy Medhi court witness for the purposes of ascertaining the age of the accused. However, the G statements of those witnesses were not discussed in detail in view of the statement of Mr. J.M. Choudhry, advocate stated to be renowned criminal lawyer, who represented the accused, that he was not challenging the findings of the trial court on the point of age of the accused. It appears, as usually happens during the course of the arguments in a court, that the evidence produced regarding the age of the accused in this case, was deliberated and H realising the tentative views of the court on the point and in the light of

preponderance of evidence, the learned defence counsel rightly conceded, "he was not challenging the findings of the Trial Court on the point of age of the accused". It is contended that despite such a statement of the defence counsel, the High Court ought to have discussed the statement of the witnesses regarding age and arrived at its own independent conclusions. We feel such a course, if adopted, would have been appreciable but if after noticing the statements of the witnesses, hearing arguments and in view of concession made by a counsel of stature, the High Court itself has not returned a finding, that would not render its judgment either illegal or be made a ground for holding that the accused was minor at the time of occurrence. Failure of the High Court to return a positive finding on the subject with regard to the age of the accused has necessitated the examination of whole evidence by us even at this stage of the proceedings.

I am also satisfied that the petitioner was not a juvenile within the meaning of the Act nor did he seriously claim to be a juvenile for the purposes of getting the benefit of Section 22 of the Act. The Judgment of the trial court and the High Court cannot be assailed on the ground of having been passed in violation of the mandate of law.

Despite holding that neither the petitioner was juvenile nor the provisions of the Act were applicable in the case, we examined this matter from another angle, i.e., to find out as to whether the petitioner was near or about the age of a juvenile for the purposes of ascertaining as to whether the death sentence can be substituted by imprisonment for life. We are of the considered opinion that the technicalities of law cannot come in the way of dispensing justice in a case where the accused is likely to be given the extreme penalty imposable under law. In deference to the judgment of this Court in *Gopinath Ghosh* v. *State of West Bengal,* [1984] Supp. SCC 228 and *Bhola Bhagat* v. *State of Bihar,* [1997] 8 SCC 720 we have taken upon ourselves to examine as to whether the accused was a child or was near or about the age of a juvenile for the purposes of ascertaining as to whether the death sentence can be substituted by imprisonment for life. The plea regarding the age of the accused was determined by the trial court which dealt with the evidence relating to the age of the accused before, it holding:

> "DW1 Firato Chauhan was subjected to severe cross-examination and in the cross examination he admitted that Rajnath, the accused is his second son after Suraj Chauhan, his eldest son. There are three other sons after Ramdeo Chauhan. According to him, his present age is 70

A years and the age of his only wife if 60 years. Two sons died and thereafter his eldest son Suraj was born. Every son and daughter born at an interval of three years. When he was 30 years old, his first child was born, that means, before 40 years his first child was born and his second child was born before 37 years. Suraj was born before 34 years. So, Ramdeo Chauhan must be born before 31 years, that means, present age of Ramdeo Chauhan is 31 years. Furthermore, his first son Suraj has married before 10 years. He is now a father of one female child. Rajnath Chauhan is his second son, i.e. he was born after Suraj. Even if I hold that Suraj was 18 years at the time of his marriage, now he must be 28 years of age and Ramdeo Chauhan must be now 25 years of age. If he is now 25 years of age, at the time of alleged crime, he must be 19 years of age.

According to CW 1 Dr. Bhushan Chandra Roy Medhi, the present age of the accused was above 20 years. He also admitted that now-a-days, computerised method is used to ascertain the age of a person, but that facility is not available at GMCH. He further admitted that computerised method of ascertaining age is a recent invention in the medical science. Ultimately, he stated that accused cannot be below 20 years, but it can exceed by one year.

In *Jayamala* v. *Home Secretary, Govt of Jammu and Kashmir* in AIR (1982) SC 1247 (1982) Cr.L.J. 173 in paragraph 9, the Apex Court observed that - one can take judicial notice that the margin of year in age examined by a radiological examination is of two years on either side. In the case in our hand, CW 1 Dr. Bhusan Cahndra Roy Medhi categorically stated that the age of the accused cannot be below 20 years, but it can exceed by one year. If we apply the variation of margin of 2 years on lower side, the accused must be eighteen years at present. If he is eighteen years at present, at the time of alleged occurrence he must be twelve years of age which is absolutely impossible because according to evidence adduced by the defence his age was above fifteen years at the time of alleged occurrence. If we apply the variation of margin of two years on the other side, accused may be twenty three years at present. Then the accused cannot be below sixteen years of age at the time of alleged occurrence to attract the provisions of Juvenile Justice Act, 1986 as the alleged occurrence took place before six years.

DW Satya Narayan Yadav exhibited the school admission register

and the relevant entry. But it seems that the entry in the school admission register is based on a transfer certificate issued by another school. As such, Mailoo Hindi School is not the first school where the accused first got admitted. Furthermore, from the cross examination, it appears that registers of the school are not maintained properly. In the cross examination, prosecution find out many irregularities in maintaining the school register. This register did not contain any official label which seems to be torn away. There was no note regarding the age at the time of admission in register. He could not say on what basis date of birth was noted in the school admission register. There is no mention of the year in the admission here and there. He could not say who recorded the entry in the register. Moreover, the school register contains no serial page mark and as such there is scope of manipulating the record by inserting new sheet of papers. There is no seal and signature of the authority who supplied the register to the school. It seems that it was made and prepared at the school and DW 2 Sri Satya Narayan Yadav was not the headmaster at the relevant time. He is present headmaster and joined at school very recently. He has no personal knowledge regarding the exhibit as well as the age of the accused. In view of such evidence, the school admission register cannot be said to be authentic and original document of the age of the accused. Furthermore, Rajasthan High Court in *Smt. Tara Devi, Appellant* v. *Smt. Sudesh Chaudhary,* respondent reported in AIR (1998) Rajasthan 59 held that - Date of birth - Entries in school record -Made by Headmasters in discharge of their official duties -can be regarded as pieces of circumstantial evidence only within meaning of s. 114 and not as direct evidence of date of birth. Furthermore, in this case, the DW 2 the present headmaster did not make the entries nor the entries were made within his knowledge. But age of the boy was entered into the register on basis of a Transfer Certificate produced at the time of his admission in that school. The source of the age recorded in the original school is not known to us in order to ascertain whether the information furnished at the time of first admission in the school was correct or not and in his respect, no evidence has been adduced. Furthermore, if the admission of the father in his cross examination regarding the age of the accused is accepted, entries in the school certificate cannot be said to be correct particulars of the age of the accused. In order to hold a school register or a school certificate as the correct document regarding the age of a person, the school certificate must be related to the accused and the entries

A B C D E F G H

A therein must be correct in their particulars. There is no dispute that the school certificate relates to the accused, but entries therein cannot be said to be correct in view of the evidence of DW 2, the headmaster of Mailoo Hindi High School and the admission of DW 1, the father of the accused in his cross examination.

B The prosecution also adduced evidence regarding the age of the accused.

PW 4 Rani Kanta Das stated in his deposition that when he first met the accused in the house of his younger brother in the month of November, 1991 he asked him about his address, father's name and C also his age. He stated to him that he was 20 years of age. According to PW 4, he seems to be a grown up boy aged about 20 years at that time. But that portion of the evidence was not challenged by defence while cross examining PW 4. In my view, this controversy of age is the outcome of after thought when it was seen that prosecution D almost succeeded in establishing the case against the accused.

As per Ext. 25, the accused Ramdeo Chauhan alias Rajnath Chauhan stated before I/O that he was 20 years of age when his statement was recorded by I/O on 8.3.92.

E If he was 20 years in 1991, he must be now above 26 years which almost tallies with the age ascertained from DW 1, the father, in his cross examination. Furthermore, the manner in which he committed the murder in a pre-planned manner and without hesitation by chopping one after another with a spade, which has been vividly described by F him in his confession made before the Judicial Magistrate, I think such type of pre plan, cold blooded, ghastly, gruesome murder cannot be possible for a boy below 16 years of age. It is quite natural on the part of the father and the defence to suppress the actual age to save the accused from the penalty likely to be awarded for the brutal murder as provided U/S 302 IPC. If such type of incredible evidence G is allowed, in many cases, the accused will come up with such plea and thereby rendering our justice system ineffective and also eroding the credibility of the system. I am firm in my view that accused must be minimum 25 years of age at present."

After examining the evidence led before the trial court in this regard I H find no reason to disagree with the reasoned conclusions arrived at by the

trial court.

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 at all. Column No.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 the years, months and days. Entry No.1 is dated 25th January, 1988 whereas Entry No.45 is dated 31st March, 1989. Thereafter except for Entry No.45, the page is totally blank and fresh entries are made w.e.f. 5.1.1990, apparently by one person upto Entry No.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 upto the Entry No.64 whereafter entries of 1991 are made again apparently by the same person. Entry No.36 relates to Raj Nath Chauhan, son of Firato Chauhan. In all the entries except Entry No.32, after 5.1.1990 in column No.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 concerned student has been recorded. In column No.12 again in the entries with effect from 9.1.1992, the ages 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 Evidence Act. The entries made in such a register can not be taken as a proof of age of the accused for any purpose.

Referring to the testimony of Dr. Bhushan Chandra Roy Medhi, CW1, the learned counsel for the accused has tried to make out a mountain out of mole. It appears that as per the direction of the court dated 20th December, 1997, the petitioner accused was examined by a Board of doctors to ascertain his age. In their report Exhibit C dated 23.12.1997 the Board opined "on the basis of physical examination and radiological investigation of Sh. Raj Nath Chauhan @ Ram Deo Chauhan, we are of the opinion that the age of the individual at present is above (20) years" If the accused was of atleast 20 years of age on 23.12.1997, his date of birth can be held to be near or about 23rd December, 1977. In that way, taking his minimum age to be 20 years at the time of his examination, he can be held to be of the age of about 15 years and 10 months. As the doctors were categoric in terms that he was above the age of 20 years on the date of examination, it can safely be said that he was more than 16 years of age on the date of occurrence. In reply to a question

A the doctor Sh. Bhushan Chandra Roy Medhi had stated that in my opinion the age of the accused cannot be more than 21 years. In reply to a question by the prosecution he had stated that "in my opinion the accused definitely has not attained the age of 25 years". In reply to the question put by the defence, the witness said "it is not a fact that he was of 18 or 19 years of age at the time of my examination. In this case the age of the accused cannot B be below 20 years, it can exceed one year but cannot be below 20 years. It is not a fact that the accused was below 20 years at the time of my examination".

Relying upon a judgment of this Court in *Jaya Mala* v. *Home Secretary, Government of Jammu & Kashmir & Ors.*, [1982] 2 SCC 538, the learned C defence counsel submitted that the court can take notice that the marginal error in age ascertained by radiological examination is two years at either side. The aforesaid case is of no help to the accused inamsuch as in that case the court was dealing with the age of a detenu taken in preventive custody and was not determining the extent of sentence to be awarded upon conviction of an offence. Otherwise also even if the observation made in the aforesaid D judgment are taken note of, it does not help the accused in any case. The doctor has opined the age of the accused to be admittedly more than 20 years and less than 25 years. The statement of the doctor is no more than an opinion. the court has to base its conclusions upon all the facts and circumstances disclosed on examining of the physical features of the person E whose age is in question, in conjunction with such oral testimony as may be available. An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon text books, on medical jurisprudence and texicology while determining the age F of an accused. In this vast country with varied latitude, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform.

From the evidence produced and the material placed before the courts G below, there is not an iota of doubt in my mind to hold that the petitioner was a child or near or about the age of being a child within the meaning of the Juvenile Justice Act or the Children Act. He is proved to be major at the time of the commission of the offence. No doubt, much less a reasonable doubt is created in the mind of the Court, for the accused entitling him the benefit of a lesser punishment. It is true that the accused tried to create a smoke H screen with respect to his age but such efforts appear to have been made only

to hide his real age and not to create any doubt in our mind. The judicial system cannot be allowed to be taken to ransom by having resort to imaginative and concocted grounds by taking advantage of loose sentences appearing in the evidence of some of the witnesses, particularly at the stage of special leave petition. The law insists for finality of judgments and is more concerned with the strengthening of the judicial system. The courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system and shakens the faith of the common man in the justice dispensation system has to be discouraged.

After committing the crime of murder of four innocent persons, the petitioner cannot be permitted to resort to adopt means and tactics or to take measures which, if accepted or condoned, may result in the murder of the judicial system itself. The efforts made by the accused by way of this petition, are not likely to advance the interests of justice but on the contrary frustrate it.

Learned counsel for the petitioner again made a futile attempt to challenge the verdict of the trial court under the cloak of technicalities and submitted that as the sentence and conviction were recorded on the same day, the judgment of the trial court was against the law. In support of his contentions he relied upon the judgments of this Court in *Muniappan* v. *State of Tamil Nadu,* [1981] 3 SCC 11; *Malkiat Singh & Ors.* v. *State of Punjab* [1991] 4 SCC 341 and *State of Maharashtra* v. *Sukhdev Singh & Anr.,* [1992] 3 SCC 700.

Sub-section (2) of Section 235 of the Code provides that if the accused is convicted, the judge shall unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence and then pass sentence on him according to law. In *Muniappan's* case (supra) this Court held that the obligation to hear the accused on the question of sentence is not discharged by putting formal questions to him. The judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence. It was the duty of the court to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view. In *Malkiat Singh's* case (supra) this Court observed that hearing contemplated under Section 235(2) of the Code is not confined merely to oral hearing but also is intended to afford an opportunity to the prosecution as well as the accused to place facts and materials relating

A to various factors on the question of sentence and if desired by either side to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. It was further observed that sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the B prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded as the case may be. It was further observed that the sentence awarded on the same day of finding guilt was not in accordance with law.

C In both the aforesaid judgments the amendment made in Section 309 of the Code was not taken note of. By Criminal Procedure Code Amendment Act, 1978, a proviso was added to sub-section (2) of Section 309 to the effect that "Provided also that no adjournment would be granted for the purposes only of accepting the accused person to show cause against the sentence proposed to be imposed upon him".

D

In *Sukhdev Singh's* case (supra) this Court while dealing with Section 309(2), third proviso and Section 235(2) of the Code and after referring to its earlier decisions in *Allauddin Mian & Ors.* v. *State of Bihar,* [1989] 3 SCC 5 and *Malkiat Singh's* case, (supra) held:

E

> "This proviso must be read in the context of the general policy of expeditious inquiry and trial manifested by the main part of the section. That section emphasises that an inquiry or trial once it has begun should proceed from day to day till the evidence of all the witnesses in attendance has been recorded so that they may not be unnecessarily F vexed. The underlying object is to discourage frequent adjournments. But that does not mean that the proviso precludes the court from adjourning the matter even where the interest of justice so demands. The proviso may not entitle an accused to an adjournment but it does not prohibit or preclude the court from granting one in such serious cases of life and death to satisfy the requirement of justice as enshrined G in Section 235(2) of the Code. Expeditious disposal of a criminal case is indeed the requirement of Article 21 of the Constitution; so also a fair opportunity to place all relevant material before the court is equally the requirement of the said Article. Therefore, if the court feels that the interest of justice demands that the matter should be adjourned H to enable both sides to place the relevant material touching on the

question of sentence before the court, the above extracted proviso cannot preclude the court from doing so." A

The mandate of the Legislature is clear and unambiguous that no adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him. In a case punishable with death or imprisonment for life, there is no difficulty for the court where the sentence proposed to be imposed is alternative sentence of life imprisonment but if it proposes to award the death sentence, it has discretion to adjourn the case in the interests of justice as held in *Sukhdev Singh's* case. I have no doubt in holding that despite the bar of third proviso to sub-section (2) of Section 309, the Court, in appropriate cases, can grant adjournment for enabling the accused persons to show cause against the sentence proposed on him particularly if such proposed sentence is sentence of death. We hold that in all cases where a conviction is recorded in cases triable by the Court of Sessions or by Special Courts, the court is enjoined upon to direct the accused convict to be immediately taken into custody, if he is on bail, and kept in jail till such time the question of sentence is decided. After the sentence is awarded, the convict is to undergo such sentence unless the operation of the sentence awarded is stayed or suspended by a competent court of jurisdiction. Such a course is necessitated under the present circumstances prevalent in the country and is in consonance with the spirit of law. A person granted bail has no right to insist to remain at liberty on the basis of the orders passed in his favour prior to his conviction. B C D E

Upon consideration of all relevant circumstances and in view of the settled position of law, I have no doubt in my mind that the present Review Petition is without merit, the grounds mentioned therein have been concocted and carved out for escaping the rigours of law and the sentence imposed upon the accused by well considered judgments of the trial court, High Court and this Court. The review petition is accordingly dismissed. F

PHUKAN, J. After reading draft judgments by my learned Brothers, I record my separate views on the sentence to be imposed on the accused-petitioner in this Review Petition. G

Review as the expression itself shows is a fresh view of matters already examined. As my learned Brothers have elaborately delineated the scope of review, it is unnecessary to traverse the path again. Suffice it would be to say that power of review is a restricted power which authorises the Court which H

A passed the order sought to be reviewed, to look over and go through the order, not in order to substitute a fresh or a second order; but in order to correct it or improve it because some materials which it ought to have considered has escaped its consideration. As my learned Brothers have agreed on the scope of review, the sentence of death imposed cannot be reopened. With respect, I agree with my learned Brother Mr. Justice R.P. Sethi.

B

But, a question that remains to be considered further is the effect of conclusion arrived at by my learned Brother Mr. Justice Thomas. Is the accused remediless; that remains to be seen. Few provisions in the Code of Criminal Procedure (for short the 'Code') and other in the Constitution deal C with such situation. Sections 432, 433 and 433A of the Code and Articles 72 and 161 of the Constitution deal with pardon. Article 72 of the Constitution confers upon the President power to grant of pardons, reprieves, respites or remission of punishment or to suspend, remit or commute sentence of any person of any offence. The power so conferred is without prejudice to the similar power conferred on the Governor of the State. Article 161 of the D Constitution confers upon the Governor of a State similar powers in respect of any offence against any law relating to a matter to which the executive power of the State extends. The power under Article 72 and Article 161 of the Constitution is absolute and cannot be fettered by any statutory provision such as Sections 432, 433 and 433A of the Code or by any Prison Rules.

E

Section 432 of the Code empowers the appropriate Government to suspend or remit sentences. The expression "appropriate Government" means the Central Government in cases where the sentences or order relates to the matter to which the executive power of the Union extends, and the State Government in other cases. The release of the prisoners condemn to death F in exercise of the powers conferred under Section 432 and Article 161 of the Constitution does not amount to interference with due and proper course of justice, as the power of the Court to pronounce upon the validity, propriety and correctness of the conviction and sentence remains unaffected. Similar power as those contain in Section 432 of the Code or Article 161 of the G Constitution can be exercised before, during or after trial. The power exercised under Section 432 of the Code is largely an executive power vested in the appropriate Government and by reducing the sentence, the authority concerned thereby modify the judicial sentence. The Section confines the power of the Government to the suspension of the execution of the sentence or remission of the whole or any part of the punishment. Section 432 of the Code gives H no power to the Government to revise the judgment of the court. It only

provides power of remitting the sentence. Remission of punishment assumes the correctness of the conviction and only reduces punishment in part or whole. The word 'remit' as used in Section 432 is not a term of art. Some of the meanings of the word 'remit' are "to pardon, to refrain from inflicting to give up". It is therefore no obstacle in the way of the President or Governor, as the case may be in remitting the sentence of death. A remission of sentence does not mean acquittal.

The power to commute a sentence of death is independent of Section 433A. The restriction under Section 433A of the Code comes into operation only after power under Section 433 is exercised. Section 433A is applicable to two categories of convicts : (a) those who could have been punished with sentence of death and (b) those whose sentence have been converted into imprisonment for life under Section 433. It was observed in *Mura Ram* v. *Union of India,* [1981] 1 SCC 106 that Section 433A does not violate Article 20(1) of the Constitution.

In the circumstances, if any motion is made in terms of Sections 432, 433 and 433A of the Code and/or Article 72 or Article 161 of the Constitution as the case be, the same may be appropriately dealt with. It goes without saying that at the relevant stage, the factors which have weighed with my learned Brother Mr. Justice Thomas can be duly taken note of in the context of Section 432(2) of the Code.

THOMAS, J. After reading the draft judgment prepared by my esteemed brother Sethi, J. supported by reasons forcefully and lucidly advanced there could not have been much difficulty for me to concur with it. However, having regard to certain aspects revolving on the issue whether a young man should be hanged by neck till he is dead pursuant to the judgment pronounced by us, I am unable to resist the urge to look at the question of sentence once again in an effort to see whether there is any legally permissible outlet through which his life can be spared from the hangman's noose. In my thoughtful rumination on that alternative option I feel inclined to respectfully dissent from my learned brother's conclusion that there is no scope to alter the death penalty imposed on the petitioner.

At the outset I may state that I have no doubt in my mind regarding the correctness of the observations of Sethi, J, that the sentence cannot be altered on the reasoning that the trial court did not adjourn the proceedings, after pronouncing the conviction, for the purpose of providing the convicted person time to reflect on the question of sentence. The trial judge chose to

A pronounce the sentence on the same day of pronouncing the verdict of conviction. When the Code of Criminal Procedure was amended in 1978 (By Act 45 of 1978) a proviso was introduced to sub-section (2) of Section 309 of the Code by which an interdict has been added that "no adjournment shall be granted for the purpose only of enabling the accused persons to show cause against the sentence proposed to be imposed on him." We make a note B that the said proviso does not make a distinction between offences punishable with death or imprisonment for life and the other offences, in relation to the application of the said proviso. The proviso thus reflects the parliamentary concern that the rule in all cases must be that sentence shall be passed on the same day of pronouncement of judgment in criminal cases as far as C possible, and perhaps by way of exception the said rule can be relaxed by adjourning the case to another day for passing orders on the sentence.

In *Muniappan* v. *State of Tamil Nadu,* [1981] 3 SCC 11 this Court emphasised the need to make a genuine effort to elicit all relevant information from the accused for considering the question whether the extreme penalty D is to be awarded or not. In *Allauddin Mian and Ors.* v. *State of Bihar,* [1989] 3 SCC 5 a two Judge Bench of this Court S. Natarajan, J and *A.M. Ahmadi, J* as he then was and again in *Malkiat Singh and Ors.* v. *State of Punjab,* [1991] 4 SCC 341 a three Judge Bench (A.M. Ahmadi, V. Ramaswamy and K Ramaswamy, JJ) have indicated the need to adjourn the case to a future date E after pronouncing the verdict of conviction. In those two decisions the direction contained in the proviso to sub-section (2) of Section 309 of the Code was not considered, presumably because it was not brought to the notice of the court. Hence in *State of Maharashtra* v. *Sukhdev Singh and anr.,* [1992] 3 SCC 700 the two Judge Bench (A.M. Ahmadi and K. Ramaswamy, JJ) considered the implication of the said proviso also. Learned judges observed F that the proviso to Section 309(2) does not entitle an accused to adjourn though it does not prohibit the court from granting such adjournment in serious cases. This is what Ahmadi J (as he then was) observed for the Bench:

> G "If the court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the court, the above extracted proviso cannot preclude the court from doing so."

It must be remembered that two alternative sentences alone are permitted for imposition as for the offence under Section 302 IPC - imprisonment for life H or death. Thus no court is permitted to award a sentence less than

imprisonment for life as for the offence of murder. The normal punishment for the offence is life imprisonment and death penalty is now permitted to be awarded only "in the rarest of the rare cases when the lesser alternative is unquestionably foreclosed". vide *Bachan Singh* v. *State of Punjab,* [1980] 2 SCC 684. The requirement contained in Section 235(2) of the Code (the obligation of the Judge to hear the accused on the question of sentence) is intended to achieve a purpose. The said legislative provision is meant for affording benefit to the convicted person in the matter of sentence. But when the Sessions judge does not propose to award death penalty to a person convicted of the offence under Section 302 IPC what is the benefit to be secured by hearing the accused on the question of sentence. However much it is argued the Sessions Judge cannot award a sentence less than imprisonment for life for the said offence. If a Sessions Judge who convicts the accused under Section 302 IPC (with or without the aid of other sections) does not propose to award death penalty, we feel that the Court need not waste time on hearing the accused on the question of sentence. We therefore choose to use this occasion for reiterating the legal position regarding the necessity to afford opportunity for hearing to the accused on the question of sentence.

(1) When the conviction is under Section 302 IPC (with or without the aid of Section 34 or 149 or 120B of IPC) if the Sessions Judge does not propose to impose death penalty on the convicted person it is unnecessary to proceed to hear the accused on the question of sentence. Section 235(2) of the Code will not be violated if the sentence of life imprisonment is awarded for that offence without hearing the accused on the question of sentence.

(2) In all other cases the accused must be given sufficient opportunity of hearing on the question of sentence.

(3) The normal rule is that after pronouncing the verdict of guilty the hearing should be made on the same day and the sentence shall also be pronounced on the same day.

(4) In cases where the Judge feels or if the accused demands more time for hearing on the question of sentence (especially when the Judge propose to impose death penalty) the proviso to Section 309(2) is not a bar for affording such time.

(5) For any reason the court is inclined to adjourn the case after pronouncing the verdict of guilty in grave offences the convicted person shall be committed to jail till the verdict on the sentence

A is pronounced. Further detention will depend upon the process of law.

But what causes concern to me is whether the new point advanced by Shri S. Muralidhar, learned counsel for the convicted person in this review petition, that the interdict contained in Section 22(1) of the Juvenile Justice B Act, 1986 (for short the Juvenile Act) can have impact on the question of death penalty imposed on the petitioner. The power of review of Supreme Court as envisaged under Article 137 of the Constitution is no doubt wider than the review jurisdiction conferred by other statutes on the Court.

Article 137 of the Constitution empowers the Supreme court to review C any judgment pronounced or order made, subject of course to the provisions of any law made by Parliament or any rule made under Article 145 of the constitution. Rule 1 or O.XL of the Supreme court Rules can be quoted:

> "The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground D mentioned in Order XLVII Rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record."

A Constitution bench of this Court has considered the scope of the review jurisdiction of this court *vis-a-vis* the fore-quoted rule in *PN Iswara* E *Iyer* v. *Registrar, Supreme Court of India,* [1980] 4 SCC 680.

The following observations made in the said decision are apposite now. Hence there are extracted below:

> "The rule, on its face, affords a wider set of grounds for review for orders in civil proceedings, but limits the ground vis-a-vis criminal F proceedings to 'errors apparent on the face of the record.' If at all, the concern of the law to avoid judicial error should be heightened when life or liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the framers of the rules could not have intended a restrictive review over criminal orders of judgments. G It is likely to be the other way about. Supposing an accused is sentenced to death by the Supreme Court and the 'deceased' shows up in court and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging? We think not. The power to review is in article 137 and it is equally wide in all proceedings. The rule merely canalises the flow H from the reservoir of power. The stream cannot stifle the source.

> Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here 'record' means any material which is already on record or may, with the permission of the court, be brought on record. If justice summons the judges to allow a vital material in, it becomes part of the record; and if apparent error is there, correction becomes necessitous.

In *Suthendraraja* v. *State*, [1999] 9 SCC 323 a three Judge Bench, following the aforesaid observations of the Constitution Bench, has said "the scope of review in criminal proceedings has been considerably widened by the pronouncement in the aforesaid judgment." We are proceeding to consider the point raised by the learned counsel for the petitioner after informing ourselves of the width and dimensions of the review jurisdiction of this Court.

Shri S. Muralidhar, learned counsel, made a fervent plea for giving all the benefits to the petitioner as provided in Section 22(1) of the Juvenile Act. We made it clear to the learned counsel, during the arguments, that we were not inclined to reopen the whole gamut to such a far reaching extent. However, we offered to consider the contention based on Section 22(1) of the Juvenile Act for the limited purpose of deciding whether the death sentence imposed on the petitioner is liable to be reviewed and the lesser alternative can be awarded.

Section 22(1) of the Juvenile Act says that no delinquent juvenile shall be sentenced to death, (of course this sub-section also says that no juvenile shall be sentenced to imprisonment). We have already held on facts that petitioner did not succeed in proving that he was aged below 16 years on the date of occurrence. As petitioner was arrested on the same day of occurrence it is immaterial whether the crucial date for reckoning the age of juvenility is the date of occurrence or date of arrest. Hence we are not inclined to consider whether the petitioner was entitled to be treated as a juvenile for the purpose of dealing with him under the provisions of the Juvenile Act.

But I am inclined to approach the question from a different angle. Can death sentence be awarded to a person whose age is not positively established by the prosecution as above 16 on the crucial date. If the prosecution failed to prove positively that aspect, can a convicted person be allowed to be hanged by neck till death in view of the clear interdict contained in Section 22(1) of the Juvenile Act. A peep into the historical background of how death penalty survived Article 21 of the Constitution would be useful in this context.

A Apart from the two schools of thought putting forward their respective points of view stridently - one pleading for retention of death penalty and the other for abolition of it - a serious question arose whether the law enabling the State to take away the life of a person by way of punishment would be hit by the forbid contained in Article 21 of the Constitution. In *Bachan Singh* v. *State of Punjab* (supra) the majority Judges of the Constitution Bench B saved the death penalty from being chopped out of the statute book by ordering that death penalty should be strictly restricted to the tiniest category of the rarest of the rare cases in which the lesser alternative is unquestionably foreclosed.

C The question here, therefore, is whether the plea of the petitioner that he was below the age of 16 on the date of his arrest could unquestionably be foreclosed. If it cannot be so foreclosed, then imposing death penalty on him would, in my view, be violative of Article 21 of the Constitution.

The fact that the trial court and the High Court did not accept his plea D on that score, or the fact that in our judgment we did not upset such finding, is not enough to hold that petitioner's plea regarding his juvenility as on the crucial date does not survive for consideration. In this context we may point out that the petitioner was defended in the trial court by a counsel provided by the Court. In the High Court when the appeal was heard the petitioner was E unable to engage a counsel. Hence the High court appointed an advocate on State brief. In this Court also when we heard the appeal the petitioner did not have a counsel on his own engagement and hence we appointed an advocate as amicus curiae to argue for him. It is only now when the review petition is filed that the petitioner engaged his own counsel. The reason for pointing out those aspects is to inform ourselves as to the disability of the petitioner for F effectively giving instructions to his counsel at least when the matter was before the High Court for the statutory appeal and in this Court for the appeal by special leave. It is reasonable to presume, in such circumstances, that the amicus curiae or the advocate appointed on State brief, would not have been able even to see the petitioner, much less to collect instructions from him, G during the second and third tiers. We bear in mind the aforesaid handicap of the petitioner when we look back to the findings already rendered by the courts regarding the present claim based on juvenility.

In the High Court, the counsel appointed on State brief appeared to have conceded that the petitioner was above the age of 20. How could he H have conceded on such a very crucial aspect, particularly when that counsel

was not engaged by the party himself. The Division Bench of the High Court has skirted the issue concerning his age only on the strength of such concession made by the advocate appointed on State brief. In this Court, when this appeal was heard learned amicus curiae did not focus on the age factor and hence we did not go into that aspect in our judgment. For all these reasons we are now unable to sidestep that aspect when Shri S. Muralidhar, learned counsel for the petitioner, focused on it and addressed detailed arguments.

There are four items of evidence with which the prosecution tried to establish that the petitioner was not a juvenile on 8.3.1992 (which is the relevant date). They are the following:

(1) Father of the petitioner was examined as DW-1 and during his cross examination it was elicited from him that his first child was born when he was aged 30; the petitioner is his 4th child; the interval between the birth of each child was three years. On the basis of such answers prosecution worked out the age of the petitioner as 26 years on the date of occurrence.

(2) PW-4 in his evidence said that when accused petitioner worked as a domestic servant in the house of that witness he asked the petitioner about his age in 1991 and the petitioner then replied that he was then 20 years old.

(3) In Ext.25 the statement of the accused was recorded under Section 161 of the Code of Criminal Procedure on 8.3.1992. In that statement the accused said that he was then 20 years old.

(4) On the sheet where the statement of the accused was recorded by the trial court under Section 235 of the Code on 20.9.1997, the age of the accused was shown as 25 years and 6 months.

As against those materials Sh. S. Muralidhar, learned counsel, tried to project two materials:

(i) The school register proved by the Headmaster of the school concerned (DW-2) which shows the entry made against the name Ram Deo Chauhan which is said to be that of the accused. As per the said entry the date of birth was 1.2.1997 (if so he would have been eleven months short of the age of 16 on the relevant date).

A (ii) Dr. B.C. Roy (a court witness) examined the petitioner on 23.12.1997 for ascertaining his age. In the opinion of that doctor the petitioner would have been within the range of 20 and 21 years on the said date. (This means that he would have been within the range of 15 to 16 years on the relevant date.

B We are unable to act on any one of the materials projected by the prosecution for the purpose of reaching a conclusion regarding the age of the petitioner as on the relevant date. The exercise of hatching or brewing up possible date or year of birth with the help of scattered answers given by the father of the petitioner, all during cross-examination, is a very unsound course to be adopted. At any rate such an exercise cannot be sustained to the C detriment of the person concerned. Nor can I rely on the testimony of PW-4 who said that the accused told him in 1991 that his age was 20. Such a statement cannot be regarded as reaching anywhere near the proximity of reliability for fixing up the correct age of a person. The statement recorded under Section 161 of the Code is not permitted by law to be used except for D contradicting the author of the statement. Hence it is impermissible to look into that material also. The sheet on which the statement of the accused was recorded under Section 235 of the Code contains some columns in the prefatory portion, one among them was regarding the age. The statement of the accused actually starts only after making such entries in those prefatory columns. Unless the person who filled up such prefatory columns is examined for E showing how he gathered the information regarding all such columns the entries therein cannot be regarded as legal evidence. At any rate, we cannot proceed on a presumption that such columns were filled up by the accused himself.

F Now, while switching over to the other side, if the school register can be accepted as reliable and the relevant entry can be taken as unmistakably referring to the petitioner-accused then he would certainly have been a juvenile on the relevant date. But the trial court did not accept that evidence due to the reasons mentioned in the judgment. Those reasons cannot be said to be weak. It is not shown that the school register was maintained by a G public servant in the discharge of his official duty or by any other person in the performance of a duty specially enjoined by the law of the country in which such register is kept. Thus the entry in the school register remains away from the range of acceptability as proof positive regarding the date of birth of the petitioner.

H But the evidence of the court witness (Dr.B.C. Roy) is a material which

creates reasonable doubts in our mind as to the possibility of the petitioner having been below the age of 16 on the relevant date. Dr. B.C. Roy who reached the said conclusion was an Associate Professor in Forensic Medicine. He examined the petitioner on 20.12.1997 focussing on the anatomical features. He then subjected the petitioner to a radiological examination and obtained a report thereof. On the basis of the data collected from such examination he formed his opinion that petitioner could be above 20 years on the date of examination, but he could not be above the age of 21 years. If his opinion is acceptable it means that the petitioner could have been below the age of 16 years though it is possible that he could have been above that age also but not beyond 17.

In his report the doctor has detailed all the data on which he reached his conclusion. I do not propose to extract all such data here except pointing out that such data collected by Dr. B.C. Roy are in consonance with the guidelines provided in the text-books on medical jurisprudence. (vide Modi's Medical Jurisprudence and Jhala & Raju's Medical Jurisprudence). Ossification test is done for multiple joints, for which the radiological report was obtained. The margin of error according to authorities on medical jurisprudence can be two years either way as the maximum. In this context it is useful to extract the relevant passage from Jhala & Raju's Medical Jurisprudence (6th Edn., page 198):

> "If ossification test is done for a single bone the error may be two years either way. But if the test is done for multiple joints with overlapping age of fusion the margin of error may be reduced. Sometimes this margin is reduced to six months on either side."

Of course the doctors' estimates of age is not a sturdy substitute for proof as it is only his opinion. But such opinion of an expert cannot be sidelined in the realm where we grope in the dark to find out what would possibly have been the age of a citizen for the purpose of affording him a constitutional protection. In the absence of all other acceptable materials, if such opinion points to a reasonable possibility regarding the range of his age it has certainly to be considered. When the possibility of the petitioner having been a juvenile on the relevant date cannot be excluded from the conclusion by adopting such reasonable standards, the interdict contained in Section 22(1) of the Juvenile Act cannot be bypassed for awarding death penalty to the petitioner so long as the death penalty is permitted to survive Article 21 only if the lesser alternative can be foreclosed unquestionably. In other words, if the age of the petitioner cannot be held to be unquestionably

A above 16 on the relevant date its corollary is that the lesser sentence also cannot unquestionably be foreclosed. We have to abide by the declaration of law made by the majority of Judges of the Constitution Bench in *Bachan Singh's* case (supra).

For the aforesaid reasons I am persuaded to allow this review petition
B and alter the sentence of death to imprisonment for life. The review petition is disposed in the above terms.

ORDER

In view of the majority judgment the review petition is dismissed.
C

However, this is without prejudice to the right of the petitioner to get the benefit under Sections 432, 43 & 433-A of the Code of Criminal Procedure.

K.K.T. Petition dismissed.