

TEAM CODE: BLCRL04

BEFORE THE HON'BLE HIGH COURT OF BANGLA, INDICA

IN THE MATTERS OF:

PEOPLES' CONSCIENCE

...PETITIONER

V.

UNION OF INDICA AND ANR.

...RESPONDENT

WRIT PETITION (CRL.) No. 124 /2015

ON SUBMISSION TO THE HON'BLE HIGH COURT OF BANGLA, INDICA

UNDER ARTICLE 226 OF THE CONSTITUTION OF INDICA, 1950

WRITTEN SUBMISSIONS ON BEHALF OF PETITIONER

COUNSEL ON BEHALF OF PETITIONER

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LIST OF ABBREVIATIONS

%	Percentage
&	And
¶	Paragraph
AIR	All India Reporter
Anr.	Another
Cr. LJ	Criminal Law Journal
CRC	Convention of the Rights of the Child
F.I.R	First Information Report
Govt.	Government
Hon'ble	Honourable
i.e.	That is
JJ	Juvenile Justice
LR	Law Report
Ltd.	Limited
N.C.T	National Capital Territory

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NCRB	National Crime Report Bureau
Ors.	Others
SC	Supreme Court
SCC	Supreme Court Cases
Supp.	Supplementary Volume
U.O.I.	Union of India
v.	Versus

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STATEMENT OF JURISDICTION

The Petitioners have approached the Hon'ble High Court of Bangla under Article 226 of the Constitution of Indica, 1950.¹

¹ 226. Power of High Courts to issue certain writs

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause (2) of Article 32

STATEMENT OF FACTS

- I. On the First day of March 2015, a young girl, aged about nineteen (19) years was returning from her tuition classes was forcibly stopped by a group of five (5) persons. The persons took advantage of the fact that the road was deserted at that point of time, and forcibly dragged the girl to the barn. The girl was brutally assaulted sexually, and thereafter was bathed in country liquor and set ablaze and succumbed to her wounds on March 3rd, 2015. All five (5) persons were apprehended in connection with the crime. One of them, identified for the purpose of the present case as Rana, was below eighteen (18) years of age on the date of commission of the crime, and is still a Juvenile as per the meaning given in Juvenile Justice Act, 2000.
- II. The learned trial court has sentenced all the accused to death under Section 376D and 302 of Indian Penal Code. Their appeal against the aforesaid conviction and the sentence imposed has since been dismissed and the High Court of Bangla has confirmed the death penalty.
- III. Peoples' Conscience (hereafter referred as "the group" or the petitioners, both being referred to the same person/group of persons) claimed that, on a proper interpretation of the Act, the juvenile was not entitled to the benefits under the Act but was liable to be tried under the penal law of the land in a regular criminal court along with the other accused.
- IV. They instituted a writ proceeding before the Hon'ble High Court of Bangla, which was registered as Writ Petition (Crl.) No. 124 of 2015, seeking the following reliefs:-
 - a) Laying down an authoritative interpretation of Sections 2(I) and 2(k) of the Act that the criterion of eighteen (18) years set out therein does not comprehend cases grave offences in general and of heinous crimes against women in particular that shake the root of humanity.
 - b) That the definition of offences under Section 2(p) of the Act be categorised as per grievousness of the crime committed and the threat of public safety and order.
 - c) That Section 28 of the Act be interpreted in terms of its definition, i.e., alternative punishment and serious offences having a minimum punishment of seven years imprisonment and above be brought outside its purview and the same should be tried by an ordinary criminal court.

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- d) Direction striking down as unconstitutional and void the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act No. 56 of 2000) to the extent it puts a blanket ban on the power of the criminal courts to try a Juvenile offender for offences committed under the Indian Penal Code, 1860; and
 - e) Incorporating the International concept of age of criminal responsibility and diluting the blanket immunity provided to the juvenile offender on the basis of age along with the Direction that the Respondent be tried forthwith by the competent criminal court.
- V. The group at the outset, clarified that they are neither challenging the provisions of Section 2(k) and 2(l) of the Act nor is he invoking the jurisdiction of the Court to strike down any other provision of the Act or for interference of the Court to reduce the minimum age of Juveniles fixed under the Act as eighteen (18) years.
- VI. The group has contended is that having regard to the object behind the enactment, the Act has to be read down to understand that the true test of “juvency” is not in the age but in the level of mental maturity of the offender..
- VII. The provisions of Sections 82 and 83 of the Indian Penal Code have been placed to contend that while a child below seven (7) cannot be held to be criminally liable, the criminality of those between seven (7) and twelve (12) years has to be judged by the level of their mental maturity.
- VIII. The provisions of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules); the Convention on the Rights of the Child, 1990 (CRC) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (Havana Rules), SCALE 1 International Commitments entered into by India obliges it to set up a particular framework to deal with Juvenile offenders and such obligations can be more comprehensively met.
- IX. The group has also suggested that Section 28 of the Act be read together with Section 15 to enable the alternatively higher punishment under other State/Central enactments.
- X. Based on these facts the case rests in the Hon’ble High Court of Bangla.

ISSUES RAISED

- 1) WHETHER THE WRIT PETITION BROUGHT BEFORE THIS COURT IS MAINTAINABLE.

- 2) WHETHER THE JUVENILITY WILL DEPEND UPON THE NATURE OF OFFENCE COMMITTED AS IN THE EXISTING SCENARIO MOST OF THE JUVENILES ARE ENGAGED IN HORRENDOUS AND HEINOUS CRIMES LIKE RAPE, MURDER AND DRUG – PEDDLING, ETC?

- 3) CAN THE CONSTITUTIONAL SANCTION OF AN ENACTMENT HAVE AN OVERRIDING EFFECT TO AN INTERNATIONAL CONVENTION AND/OR STATUTE, OF WHICH INDIA IS A SIGNATORY?

- 4) WHETHER OSSIFICATION TEST SHALL BE PREFERRED OVER MATRICULATION CERTIFICATE AS AN APPROPRIATE METHOD TO DETERMINE THE AGE OF A JUVENILE?

SUMMARY OF PLEADINGS

1) WHETHER THE WRIT PETITION BROUGHT BEFORE THIS COURT IS MAINTAINABLE?

The Writ Petition made in furtherance to the Honorable High Court due to the juvenile board's inability to decide a question of law is maintainable under Article 226 of the Constitution of India as: firstly, the jurisdiction of High Court can always be invoked; secondly, the Hon'ble HC is well within its rights to accept the writ petition on application from the petitioners and thirdly, existence of Alternative Remedy is no bar to file petition.

2) WHETHER THE JUVENILITY WILL DEPEND UPON THE NATURE OF OFFENCE COMMITTED AS IN THE EXISTING SCENARIO MOST OF THE JUVENILES ARE ENGAGED IN HORRENDOUS AND HEINOUS CRIMES LIKE RAPE, MURDER AND DRUG – PEDDLING, ETC.

The juvenility should depend upon the nature of offence committed by the accused because: firstly, the JJ act is in violation of the Constitution of India in so far as it provides immunity to the Juveniles charged with serious offences from being tried before the Criminal Court; secondly, the true test of juvenility should lie in the mental maturity of the person not his/her age and thirdly, undue sympathy with juvenile offenders will undermine our judicial system.

3) WHETHER THE CONSTITUTIONAL SANCTION OF AN ENACTMENT HAS AN OVERRIDING EFFECT TO AN INTERNATIONAL CONVENTION AND/OR STATUTE, OF WHICH INDIA IS A SIGNATORY?

The Constitution sanction of an enactment has an overriding effect to an International Convention to which India is a signatory as: firstly, International Convention derives power from the Constitution and it does not become a law unless it passed by the Parliament.

4) WHETHER OSSIFICATION TEST SHALL BE PREFERRED OVER MATRICULATION CERTIFICATE AS AN APPROPRIATE METHOD TO DETERMINE THE AGE OF A JUVENILE?

The real test to determine the age of juvenile should be the Ossification Test and not the Matriculation or other similar certificates as: firstly, the protection provided by the act must not be misused in any manner; secondly, the documents can't always be relied upon as they can be forged by the accused and thirdly, there is no fixed criterion of enquiry as stated in the Juvenile Justice Act, 2000.

WRITTEN PLEADINGS

1. WHETHER THE WRIT PETITION BROUGHT BEFORE THIS COURT IS MAINTAINABLE?

1.1 Jurisdiction of HC under Article 226 can always be invoked.

- I.** It is humbly submitted before this Hon'ble Court that whenever a question of law of general public importance arises the jurisdiction can be invoked. The jurisdiction conferred under Art. 226 on the High Court are corrective one and not a restrictive one.² A duty is enjoined upon the High Court to exercise its power by setting right the illegality in the judgments is well-settled that illegality must not be allowed to be perpetrated and failure by the High Court to interfere with the same would amount to allowing the illegality to be perpetuated.³ It has been held in plethora of cases that when the question of law of general public importance arises, the jurisdiction of High Court can be invoked. In the present case, the issue involves matter of General Public Importance and hence, entitled to be maintainable.
- II.** It is humbly submitted that the expression "substantial question of law"⁴ is not defined in any legislation. Nevertheless, it has acquired a definite connotation through various judicial pronouncements. A Constitution Bench of the Apex Court, while explaining the import of the said expression, observed that:
- "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views."*⁵
- III.** In the present case, the question of law involved in appeal is of recurring nature which has been raised in plethora of cases. Hence, it is humbly submitted before this

² Haryana State Industrial Corporation v. Cork Mfg. Co. , AIR 2008 SC 56.

³ Pawan Kumar v. State of Haryana, (2003) 11 SCC 241.

⁴ Dale & Carrington Investment Ltd. v. P.K. Prathapan, (2005) 1 SCC 212.

⁵ Chunnihal Mehta v. Century Spinning & M Co. Ltd. , AIR 1962 SC 1314.

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Hon'ble High Court of India that the matter involves substantial question of law and hence entitled to be maintainable.

- IV. The SC is not precluded from going into the question of facts under article 226, if it considers it necessary to do so⁶. The Article 226 uses the wording 'in any cause or matter'. This gives widest power to this court to deal with any cause or matter. It is plain that when the High Court reaches the conclusion that a person has been dealt with arbitrarily or that a court or tribunal has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of finding of facts, or otherwise can stand in the way of the exercise of this power.

1.2. The Hon'ble HC is well within rights to accept the writ petition on application from the petitioners

- I. It is humbly submitted before this Hon'ble Court that Section 53 of The JJ Act⁷ states that:

The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit;

Provided that the High Court shall not pass an order under this section prejudicial to any person to any person without giving him a reasonable opportunity of being heard.

- II. Although in the present case the juvenile board has wisely requested the High Court's opinion due to the involvement of a substantial question of law, but even in arguendo if the case had been decided by the Juvenile Justice Board, this honorable court had the full authority to call for the record of any proceeding.

⁶ Kathi Ranig Rawat v. The State of Saurashtra, AIR 1952 SC 123.

⁷ Juvenile Justice(Care and Protection of Children),Amendment Act, 2006

1.3.The existence of an alternative remedy is no bar to file petition

- I.** It is humbly submitted before the Hon'ble Court that the remedy under Article 226 of the Constitution is discretionary remedy.⁸ The Court is vested with power to entertain the petition where there occurs gross miscarriage of justice and effective remedy is not available. This rule of exhaustion of the statutory remedy is not rigid but somewhat flexible and it is primarily a matter of the discretion of the writ court.⁹ Reliance is placed upon the decision in the case of *Whirlpool's Corp. v. Registrar of Trade Marks*¹⁰, in which it was held by the Apex Court that the jurisdiction of the High Court in entertaining a writ petition under article 226 of the Constitution would not be affected although there exists alternative statutory remedies.
- II.** Lastly, it is submitted that a writ petition is maintainable when the lis involves a public law character and when the forum chosen by the parties would not be in apposition to grant appropriate relief.¹¹ Question as to when discretionary jurisdiction is to be exercised or refused has to be determined having regard to the facts and circumstances of each case. No hard and fast rule can be laid down in this regard.¹²

⁸ Sripur Paper Mills v. Commissioner of Wealth Tax, (1970) AIR 1520.

⁹ A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhvani, AIR 1961 SC 1506.

¹⁰ Whirlpool Corporation v. Registrar of Trade Marks, AIR 1999 SC 22.

¹¹ M.P. Jain, Indian Constitutional Law, 415(7th Ed., 2014).

¹² Onkar Lal Bajaj v. Union of India, (2003) 2 SCC 673.

2. WHETHER THE JUVENILITY WILL DEPEND UPON THE NATURE OF OFFENCE COMMITTED AS IN THE EXISTING SCENARIO MOST OF THE JUVENILES ARE ENGAGED IN HORRENDOUS AND HEINOUS CRIMES LIKE RAPE, MURDER AND DRUG – PEDDLING, ETC.?

2.1. The act is in violation of the Constitution of India in so far as it provides immunity to the Juveniles charged with serious offences from being tried before the Criminal Court.

- I.** It is humbly submitted before this Hon'ble court that the Juvenile Justice (Care and Protection of Children) Act, 2000, operates in violation of Articles 14 and 21 of the Constitution and that Article 13(2), which relates to post Constitution laws, prohibits the State from making a law which either takes away totally or abrogates in part a fundamental right. Any law made in contravention of FRs is dead from the very beginning and cannot be taken notice of or read for any purpose whatsoever.¹³
- II.** It is submitted before this Hon'ble Court that treating Rana as a juvenile and letting him escape the punishment from the Criminal law unmindful of the nature and gravity of offence, based on his actual age than mental maturity and thereby taking away the judicial discretion in totality and absolutely, is highly irrational and has no reasonable nexus to the objective sought to be achieved and is contrary and in violation of the Article 14 and 21 of the Constitution.
- III.** Under Article 21 of the Constitution, every citizen has a fundamental right to live in dignity and peace¹⁴, and that by shielding juveniles, who were fully capable of understanding the consequences of their actions, from the sentences, as could be awarded under the Indian Penal Code, as far as adults are concerned, the State was creating a class of citizens who were not only prone to criminal activity, but in whose cases restoration or rehabilitation was not possible. The alarming rise in heinous crimes like kidnapping, sexual assault on women and dacoity have impinged upon the right to life and the right to live in a safe environment which are within the contours of Article 21 of the Constitution of India.¹⁵ It is therefore submitted that submitted the provisions of Sections 15 and 16 of the Juvenile

¹³ Rakesh Vij v. Raminder Pal Singh Sethi, (2005) 8 SCC 504.

¹⁴ Francis Coralie v. Administrator, Union Territory of Delhi, AIR 1981 SC 746.

¹⁵ Avishek Goenka v. Union of India, (2012) 8 SCC 441.

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Justice (Care and Protection of Children) Act, 2000, violates the rights guaranteed to a citizen under Article 21 of the Constitution and were, therefore, liable to be struck down.

- IV. From the figures cited by NCRB¹⁶, it is urged that even going by statistics, 1% of the total number of crimes committed in the country would amount to a large number and the remedy to such a problem would lie in the Probation of Offenders Act, 1958, which made the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, redundant and ultra vires Article 21 of the Constitution. It is submitted that crimes committed by juveniles had reached large and serious proportions and that there was a need to amend the law to ensure that such persons were not given the benefit of lenient punishment, as contemplated under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000.
- V. The SC has strongly emphasized for a development in the current legislation relating to juvenile offender in the case of *Gaurav Kumar v. The State of Haryana*¹⁷ where it observed that the rate of crime and the nature of crime in which the juvenile are getting involved, have increased and was of the view that a time has come to think of an effective law to deal with the situation. In this regard it is submitted that the definition of offences under Section 2(p) of the JJ Act be categorized as per grievousness of the crime committed and the threat of public safety and order.¹⁸
- VI. Lastly it is urged that the Act contemplates in place of a regular criminal trial a non-adversarial inquiry against the juvenile where the prime focus is not on the crime committed but on the reasons that had led the juvenile to such conduct. The maximum power of punishment, on proof of guilt, is to send the juvenile to a special home for three years. The entire scheme under the Act being substantially different from what is provided by the Code of Criminal Procedure for investigation of offences and for trial and punishment of offenders, it is submitted that the Act offends a core constitutional value namely, the existence of a criminal justice system. The said juvenile Rana is liable to be tried by a competent criminal court in accordance with the procedure prescribed. In this regard, it is also submitted that the concept of double jeopardy under Article 20(3) of the Constitution and Section 300 of Penal Code will have

¹⁶ National Crime Record Bureau, Crime in India 2013 Statistics, available at <http://ncrb.nic.in/StatPublications/CII/CII2013/Statistics-2013.pdf>, last seen on 10/1/2017

¹⁷ ¶ 9, 2015 SCC OnLine SC 287.

¹⁸ Moot proposition, ¶ 8(b).

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no application inasmuch as the proceedings before the JJ Board did/does not amount to a trial.

2.2. The true test of juvenility should lie in the mental maturity of the person not his/her age.

- I. It is humbly submitted before this Hon'ble Court that laying down an authoritative interpretation to *Section 2(k) and 2(l)* set out therein should be based on the mental maturity of the person rather than his age. The NCRB report¹⁹ shows that the rate of Crimes committed by Juveniles has shown an increase over the past 10 years and by the data collected by them it stands at 2.6% as of 2013. The Juvenile Justice Board should be vested with the discretion to impose punishment beyond three years, as limited by Section 15²⁰ if the juvenile is mature enough and has committed a grave offence which is punishable either with life imprisonment or death.
- II. It is quite evident prima facie, the act of Rana which comprised of committing rape on a helpless girl followed by bathing her in country liquor and eventually setting her ablaze²¹ implies that he does not deserve to be treated as a juvenile. The idea behind the act was to provide immunity to adolescents who commit crime and take steps to reintegrate them in the society but juveniles like Rana would pose a serious threat to the society.
- III. It is submitted before this Hon'ble Court that having regard to the object behind the enactment, the Act has to be read down to understand that the true test of juvenility is not in the age but in the level of mental maturity of the offender. This, it is contended, would save the Act from unconstitutionality and also further its purpose. The Act is not intended to apply to serious or heinous crimes committed by a juvenile. The provisions of Sections 82 and 83 of the Indian Penal Code states that while a child below 7 cannot be held to be criminally liable²² the criminality of those between 7 and 12²³ years has to be judged by the

¹⁹ Supra 5.

²⁰ Juvenile Justice(Care and Protection of Children) Act, 2000.

²¹ Moot Proposition, ¶2.

²² Section 82, The Indian Penal Code, 1860.

²³ Section 83, The Indian Penal Code, 1860.

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level of their mental maturity.²⁴ The same principle should apply to all children beyond 12 and up to 18 years also. This is how the two statutes i.e. Indian Penal Code and the Act has to be harmoniously understood.

- IV. In the *Bombay Blasts Case*²⁵, a juvenile was tried and convicted along with adults under the Terrorist and Disruptive Activities Act (TADA), and was denied the protection of the Juvenile Justice (Care and Protection of Children) Act, 2000, on account of the serious nature of the offence and was contended that the purport and effect of Section 1(4)²⁶ of the Act (Amendment 2006) must be understood in a limited manner.
- V. Elaborate statistics have been laid before us to show the extent of serious crimes committed by juveniles and the increase in the rate of such crimes²⁷. Also, if mature and cognitive individuals are given the armour of a Special Law allowing them to commit offences under the Indian Penal Code without any liability, they would breed within themselves enraged criminals with psychotic tendencies. Fake birth certificates would throng and act as a weapon of defence against prosecution for their wrongdoings. This is against the principles of natural justice and against the nature of an intelligent civilized society.
- VI. It is urged before this Hon'ble Court that such a child did not deserve to be treated as a child and be allowed to re-mingle in society, particularly when the identity of the child is to be kept a secret under Sections 19 and 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000. Furthermore, the provisions of Section 19 of the Act, which provides for removal of disqualification attaching to conviction, are also illogical and were liable to be struck down. It is humbly submitted that in order to prevent repeated offences by an individual, it is necessary to maintain the records of the inquiry conducted by the Juvenile Justice Board, in relation to juveniles so that such records would enable the authorities concerned to assess the criminal propensity of an individual, which would call for a different approach to be taken at the time of inquiry.

²⁴ Moot proposition, ¶ 11.

²⁵ *Essa@ Anjum Abdul Razak Memon vs State of Maharashtra*, (2013) 13 SCC 1 .

²⁶ Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law.

²⁷ *Subramanian Swamy v. Raju*, (2014) 8 SCC 390.

VII. Lastly, it is submitted before this Hon'ble court that mitigating circumstances has to be considered for imposition of sentence of death to accused²⁸. In the case of *Bachan Singh*²⁹ and *Machhi Singh*³⁰ the court laid down various principles for awarding sentence and said that the age of the accused is a relevant consideration but not a determinative factor by itself. It is urged that in many cases children between the ages of sixteen to eighteen years were, in fact, being exploited by adults to commit heinous offences who knew full well that the punishment therefore would not exceed three years and the same can be inferred from the moot proposition where the juvenile along with four other adults was involved in the gang rape of a girl.³¹

2.3. Undue sympathy with juvenile offenders will undermine our judicial system

- I. It is humbly submitted that the ban on jurisdiction of criminal courts by Section 7 of the Act³² is unconstitutional in as much as it virtually ousts the criminal justice system from dealing with any offence committed by a juvenile. Parliament cannot make a law to oust the judicial function of the courts or even judicial discretion in a matter which falls within the jurisdiction of the courts. Reliance in this regard is placed on the judgments of Supreme Court in the case of *Mithu vs. State of Punjab*³³ and *Dadu vs. State of Maharashtra*³⁴.
- II. It is submitted that punishment should always be proportionate/commensurate to the gravity of offence.³⁵ The same has been reiterated in the case of *Ravji @ Ram Chandra vs. State of Rajasthan*³⁶, where the Court held that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial.

²⁸ *Atbir v. Govt. of N.C.T. Delhi*, (2010) 9 SCC 1.

²⁹ *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

³⁰ *Machi Singh v. State of Punjab*, AIR 1983 SC 957.

³¹ Moot proposition, ¶ 1.

³² *Supra* 22.

³³ (1983) 2 SCC 277.

³⁴ (2000) 8 SCC 437.

³⁵ *State of Rajasthan v. Vinod Kumar*, (2012) 6 SCC 770.

³⁶ AIR 1996 SC 787.

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- III. *In Jai Kumar vs. State of Madhya Pradesh*³⁷, the SC confirmed the death penalty of the person accused of rape and opined imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.³⁸
- IV. It is urged before this Hon'ble Court that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats.³⁹ It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.
- V. It is submitted before this Hon'ble Court that it should hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls⁴⁰ which is the case here with the 19 year old victim. The counsel respectfully submits that if a person is old enough to rape then he is old enough to be tried along with adults and that is why he contends that the criterion of eighteen (18) years set out in the JJ Act should not comprehend cases of grave offences in general and of heinous crimes against women in particular that shakes the root of humanity in general.

³⁷ (1999) 5 SCC 1.

³⁸ Dhananjay Chatterjee vs State of West Bengal, (1994) 2 SCC 220.

³⁹ State of Uttar Pradesh vs Sattan alias Satyendra and Ors, (2009) SCC 736.

⁴⁰ State of Karnataka v. Krishnappa. 2000(5) SCC 75.

3. WHETHER THE CONSTITUTIONAL SANCTION OF AN ENACTMENT HAVE AN OVERRIDING EFFECT TO AN INTERNATIONAL CONVENTION AND/OR STATUTE, OF WHICH INDICA IS A SIGNATORY?

3.1. International conventions derive power from the constitution

I. It is humbly submitted before this Hon'ble Court that Article 51 of the Constitution had its source and inspiration in the Havana Declaration of 30 November 1939. With the acceptance of amendments moved by our Constitution makers the draft Art. 40 was adopted by the Constituent Assembly in its present form as Article 51. Everyone emphasized commitment of India to promoting International Peace and Security and adherence to principles of International Law and Treaty obligations.⁴¹ Article 51 has been relied upon by Courts to hold that various International Covenants, Treaties etc., particularly those to which India is a party or signatory, become part of Domestic Law in so far as there is no conflict between the two.⁴² In *Keshavanand Bharti v. State of Kerala*⁴³, the court observed:

“In view of Article 51 of the constitution this court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of United Nations Charter and the solemn declaration subscribed to by India”

II. It is submitted before this Hon'ble Court that under the scheme of the Constitution, International Treaties can be legally enforceable in India only when Parliament enacts an enabling legislation incorporating it under the domestic system. This stance is also fortified by the fact that India continue to act under the influence of Common Law system accepted during British rule and continued even after the coming in to force of the Constitution.⁴⁴

III. It is submitted that Under Article 53 the executive power of the Union vests with the President of India. It is pertinent to note here that the President acts under the aid and advise of the Union Cabinet.⁴⁵ Under Article 73, the executive power of the Union extends to all matters in respect of which parliament may make laws and to exercise

⁴¹ C. Kashyap, B.N. Patel, *The constitution of India and International Law*, 19(3rd ed., 2005)

⁴² *Mirza Ali Akbar Kashani v. United Arab Republic and Anr.*, AIR 1966 SC 230.

⁴³ *Keshavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

⁴⁴ Article 372, Constitution of India, 1950.

⁴⁵ Article 74, Constitution of India, 1950.

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of all powers that accrue to the Government of India from any International Treaty or Agreement. It is also important to note here that executive power has to be exercised in accordance with Constitution and the laws.

- IV. It is submitted before this Hon'ble Court that the power to make any law for the whole or any part of the country to give effect to any International Treaty, Agreement, Convention or decision lies with the Parliament⁴⁶. It is further submitted that treaty entered in to by India cannot become law of the land and it cannot be implemented unless parliament passes a law as required under Article 253.⁴⁷ The effect of Art 253 is that if a treaty, agreement or convention with a foreign state deals with a subject within the competence of state legislature, the parliament alone has notwithstanding Article 246(3) the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body
- V. Lastly, it is submitted that the combined reading of Articles 51(c), 73, 253 read with entries 10 to 21 of Seventh Schedule and 372 and judicial interpretation reveal that, unless and until Parliament enacts a law implementing international treaty, such treaty provisions cannot be enforced per se in India. Further if such treaty provisions are consistent with Indian law or there is void in the domestic legal system then they can be read into, to do justice, and if there is conflict between the two then domestic laws prevail over international law.⁴⁸

⁴⁶ Article 253, Constitution of India, 1950.

⁴⁷ State of West Bengal v. Kesoram Industries Ltd., AIR 2005 SC 1644, ¶ 4.

⁴⁸ People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568.

4. WHETHER OSSIFICATION TEST SHALL BE PREFERRED OVER MATRICULATION CERTIFICATE AS AN APPROPRIATE METHOD TO DETERMINE THE AGE OF A JUVENILE

4.1. The Protection Provided By The Act Must Not Be Misused In Any Manner.

- I. It is submitted that, the accused here has committed such a grave and heinous offence that he might have a strong background to alter the original documents and produce forged documents in the court so in order to attain justice the court must take another view regarding the age with the help of ossification test. Similar approach has been taken by the Hon'ble Supreme court when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor,⁴⁹ a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.⁵⁰
- II. It is further submitted that, 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.⁵¹
- III. Moreover it is submitted that, although the test of reasonable doubt directs to give the benefit to the accused, but it is submitted that in the present since the crime committed is so serious and heinous in nature that the court cannot afford to give statutory benefit to the accused and hence even though matriculation certificates are available but the court must opt for an ossification test to be doubly sure as the test may provide a surer basis for determining the age.⁵²
- IV. The counsel most humbly submits that the present case is an exceptional case which warrants the awarding maximum penalty under the law to the accused.⁵³
The crime committed by the accused is not only shocking but it has also

⁴⁹ Ramdeo Chauhan v. State of Assam, (2001) 5 SCC 714.

⁵⁰ Parag Bhati (Juvenile) v. State of U.P., (2016) SC 509.

⁵¹ Modi's Medical Jurisprudence and Jhala & Raju's Medical Jurisprudence, ISBN 9788180386961, Lexis Nexis, 6th Edn., p. 198.

⁵² Jaya Mala v. Home Secy., Govt., of J&K, (1982) 2 SCC 538.

⁵³ Gurdev Singh v. State of Punjab, (2003) 7 SCC 258.

jeopardized 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 him were most cruel, heinous and dastardly.⁵⁴ We have no doubt that the present case is the rarest of rare case requiring the maximum penalty imposable under law." So, the court must also opt for ossification test to determine the age, since ordinary procedure must be given special protection here.

4.2. The Documents Can't Always Be Relied Upon As They Can Be Forged By -the Accused

- I.** It is most humbly submitted before the Hon'ble Court that the school records and transfer certificates did not satisfy the condition laid down in Section 35 of the Evidence Act⁵⁵ inasmuch as the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country,⁵⁶ and hence, there is need for a proper examination to determine the age of the accused which is ossification test.
- II.** It is further submitted that, in a circumstance where the trial court itself could not arrive at a conclusive finding regarding the age of the accused, the opinion of the medical experts based on x-ray and ossification test will have to be given precedence over the shaky evidence based on school records and a plea of circumstantial inference.⁵⁷ So, such opinion of an expert cannot be sidelined in the realm where the court gropes in the dark to find out what would possibly have been the age of a citizen for the purpose of affording him a constitutional protection⁵⁸ as there is always a possibility where the documents submitted can be forged or adulterated to some extent whereas the ossification test is always calculated and unadulterated.
- III.** It is submitted that, the documents can be forged by the accused just to enjoy the benefits of the act which is bad in the eyes of law and reliance can't be place on

⁵⁴ Moti Lal v. State of M.P, (2004) 2 SCC 469.

⁵⁵ Ashwani Kumar Saxena v. State of M.P., (2012) 9 SCC 750.

⁵⁶ Jabar Singh v. Dinesh, (2010) 3 SCC 757.

⁵⁷ Om Prakash v. State of Rajasthan, (2012) 5 SCC 201.

⁵⁸ Supra 28.

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such documents especially when the offence committed is so serious in nature as in the present case. In *Jyoti Prakash Rai v. State of Bihar*⁵⁹, the Hon'ble Supreme court held that on the basis of several factors including the fact that school leaving certificate and the horoscope produced by the petitioner were found to be forged and fabricated and having regard to the two medical reports the courts below have found the age of the petitioner to be above 18 years.⁶⁰

- IV.** Moreover it is submitted that, Section 35 of the Evidence Act for proving an entry pertaining to the age of a student in a school admission register is to be considered for the purpose of determining the relevance thereof. So an entry in a school register may not be a public document and, thus, must be proved in accordance with law.⁶¹ So, the Petitioner submits that in the event it is doubtful, the medical evidence will have to be given due weightage while determining the age of the accused.⁶²

4.3. There Is No Fixed Criterion of Enquiry As Stated In The Juvenile Justice Act, 2000

- I.** It is most humbly submitted that a claim of juvenility may be raised at any stage even after the final disposal of the case.⁶³ It may be raised for the first time before the Supreme Court as well after the final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before the Supreme Court though not pressed before the trial court and in the appellate court.⁶⁴
- II.** Moreover it is submitted that, it is the duty of the courts that the benefit of the provisions meant for Juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the

⁵⁹Jyoti Prakash Rai v. State of Bihar, (2008) 15 SCC 223.

⁶⁰Ibid.

⁶¹Ram Suresh Singh v. Prabhat Singh, (2009) 6 SCC 681.

⁶²Om Prakash v. State of Rajasthan, (2012) 5 SCC 201.

⁶³Section 7A in The Juvenile Justice (Care and Protection of Children) Act, 2000

⁶⁴Abuzar Hossain v. State of W.B., (2012) 10 SCC 489.

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basis of procured certificates.⁶⁵ In *Mohd. Wasim v. State*⁶⁶, the ossification report was prepared in AIIMS which reduced the margin of error to six months, which was enough to conclude that appellant was not juvenile on day of incident. So, the counsel humbly submits that a harmonious approach should be adopted whereby the ossification test should be made compulsory even though matriculation certificates and other documents are available in cases where the offence committed is of so serious a nature as in the present case.

- III.** It is further submitted that, where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.⁶⁷ The bare reading of this section shows that there is no specified format to be followed under the act and hence ossification test can placed reliance upon.
- IV.** Further it is submitted that the court keep in view the beneficial nature of the socially-oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care⁶⁸ and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other."⁶⁹ So here also the court does not show any preference to the mode to be selected and hence ossification test can relied upon.

⁶⁵ Jitender Ram @ Jitu v. State of Jharkhand, (2006) 9 SCC 428.

⁶⁶ Mohd Wasim and Ors. v. State of U.P., 1992 Cr.LJ 1299.

⁶⁷ Section 49, Juvenile Justice (Care and Protection of Children) Act, 2000.

⁶⁸ Bholu Bhagat v. State of Bihar, (1997)8 SCC 720.

⁶⁹ Babloo Pasi v. State of Jharkhand, (2008) 13 SCC 133.

PRAYER

Wherefore in the light of the issues raised, arguments advanced and authorities cited, it is humbly requested that this Hon'ble Court may be pleased to adjudge and declare:

- The writ petition filed as maintainable,
- The constitutional sanction of an enactment has an overriding effect to an international convention of which India is a signatory,
- The Juvenility should depend upon the nature of the offence committed and not on the age,
- Ossification test should be used to determine the age of a juvenile in conflict with law.

And pass any such order, other order that it deems fit in the interest of Justice, Equity and Good Conscience.

And for this, the Petitioner as in duty bound, shall humbly pray.

COUNSEL ON BEHALF OF THE PETITIONER