

**INSTITUTE OF LAW, KURUKSHETRA UNIVERSITY, KURUKSHETRA**

**1<sup>st</sup> NATIONAL MOOT COURT COMPETITION, 2016**

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**IN THE HON'BLE SUPREME COURT OF INDIANA**

**(CRIMINAL APPELLATE JURISDICTION)**

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**SPECIAL LEAVE PETITION (CRL.) NO. \_\_\_\_ OF 2016**

**SHEKHAR SAXENA**

**.....PETITIONER**

*Versus*

**UNION OF INDIANA**

**.....RESPONDENT**

**(UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIANA)**

**WITH**

**SPECIAL LEAVE PETITION (CRL.) NO. \_\_\_\_ OF 2016**

**SHYAMA**

**.....PETITIONER**

*Versus*

**UNION OF INDIANA**

**.....RESPONDENT**

**(UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIANA)**

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**MEMORIAL ON BEHALF OF THE PETITIONER**

**TABLE OF CONTENTS**

**LIST OF ABBREVIATIONS.....4**

**INDEX OF AUTHORITIES.....6**

**STATEMENT OF JURISDICTION.....9**

**STATEMENT OF FACTS.....10**

**ISSUES RAISED.....13**

**SUMMARY OF ARGUMENTS.....14**

**ARGUMENTS ADVANCED.....18**

**1. WHETHER THE SPECIAL LEAVE PETITION BROUGHT BEFORE THIS COURT IS MAINTAINABLE OR NOT.....18**

1.1 JURISDICTION OF SC UNDER ARTICLE 136 CAN ALWAYS BE INVOKED WHEN A QUESTION OF LAW OF GENERAL PUBLIC IMPORTANCE ARISES.....18

1.1.1 THAT THE MATTER INVOLVES QUESTION OF LAW OF GENERAL PUBLIC IMPORTANCE AND HENCE, ENTITLED TO BE MAINTAINABLE.....19

1.1.2 THE MATTER INVOLVES SUBSTANTIAL QUESTION OF LAW AND HENCE ENTITLED TO BE MAINTAINABLE.....20

**2. WHETHER THE SESSIONS & HIGH COURT WERE JUSTIFIED IN REJECTING THE BONE TEST.....22**

2.1 THE BONE TEST IS A RELIABLE SOURCE.....24

2.2 THE LOWER COURT IS NOT JUSTIFIED FOR DENYING THE OSSIFICATION TEST AS A RIGHT TO SHAYAMA.....24

<b><u>3. WHETHER THE ACT OF SHEKHAR WAS IN FURTHERANCE OF COMMON INTENTION DEFINED UNDER S.34 OF IPC.....</u></b>	<b>26</b>
<u>3.1 ABSENCE OF COMMON INTENTION.....</u>	28
<u>3.2 THE ACT WAS NOT IN FURTHERANCE OF COMMON INTENTION.....</u>	29
<b><u>4. WHETHER THE ACT IS IN CONTRAVENTION WITH THE CONSTITUTION OF INDIANA AND INTERNATIONAL NORMS.....</u></b>	<b>30</b>
<u>4.1. THE ACT IS IN CONTRAVENTION WITH THE ARTICLE 15(3) OF THE CONSTITUTION OF INDIANA.....</u>	31
<u>4.2. THE ACT IS IN CONTRAVENTION WITH THE UN CONVENTION ON THE RIGHTS OF CHILD.....</u>	31
<b><u>PRAYER.....</u></b>	<b>35</b>

**LIST OF ABBREVIATIONS**

<b>AIR</b>	All India Reporter
<b>All</b>	Allahabad High Court
<b>Bom. LR</b>	Bombay Law Reporter
<b>Cal</b>	Calcutta High Court
<b>CBI</b>	Central Bureau of Investigation
<b>Cri LJ / Cr LJ</b>	Criminal Law Journal
<b>Cr.P.C.</b>	Code of Criminal Procedure
<b>Del</b>	Delhi High Court
<b>Ed.</b>	Edition
<b>JJA</b>	Juvenile Justice Act
<b>Guj</b>	Gujarat High Court
<b>HC</b>	High Court
<b>IPC</b>	Indian Penal Code
<b>IC</b>	Indian Cases
<b>ILR</b>	Indian Law Reports
<b>ITR</b>	Income Tax Reports
<b>JT</b>	Judgment Today
<b>Mad</b>	Madras High Court
<b>NCRB</b>	National Crime Records Bureau
<b>Ori</b>	Orissa High Court
<b>P&amp;H</b>	Punjab and Haryana High Court
<b>Pat</b>	Patna High Court
<b>Raj</b>	Rajasthan High Court

<b>SC</b>	Supreme Court
<b>SCC</b>	Supreme Court Cases
<b>SCJ</b>	Supreme Court Journal
<b>SCR</b>	Supreme Court Reporter
<b>Sec.</b>	Section
<b>U.O.I</b>	Union of India
<b>V.</b>	Versus

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- ❖ *Janshed Hormusji Wadia v Board of Trustees, Port of Mumbai*, (2004)3 SCC 214.
- ❖ *Balakrishna v. Rmaswami*, (1965) AIR 195.
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- ❖ *Dale & Carrington Investment Ltd. v. P.K. Prathapan*, (2005) 1 SCC 212.
- ❖ *Sir Chunilal Mehta and Sons. Ltd. v. Century Spinning and Manufacturing Co. Ltd.*, (1962) AIR 1314.
- ❖ *Kathi Raning Rawat v. The State of Saurashtra*, (1952) AIR 991.
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- ❖ *Sripur Paper Mills v. Commissioner of Wealth Tax*, (1970) AIR 1520.
- ❖ *Gopinath Gosh v. State of West Bengal*, AIR 1984 SC 237.
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- ❖ *Subramanian Swamy v. Raju, (2014) 8 SCC 390.*

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- ❖ Justice V. V. Raghavan, *Law of Crimes*, India Law House, New Delhi, 5th Edn. 2001.
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- ❖ Dr. Karunakaran Mathiharan, *Modi's Medical Jurisprudence and Toxicology*, LexisNexis Butterworths, 23rd Edn. 2010.
- ❖ Maharukh Adenwalla, *Child Protection and Juvenile Justice System*, ChildLine India Foundation, Mumbai, 10<sup>th</sup> Edn. 2008.

- ❖ Ved Kumari, *Juvenile Justice System in India*, Oxford University Press, New Delhi, 2004.
- ❖ S.K.A Naqvi & Sharat Tripathi, *R. N. Choudhry's Law Relating to Juvenile Justice in India*, Orient Publishing Company, New Delhi, 3<sup>rd</sup> Edn. 2012.

### **STATUTES**

- ❖ Indian Penal Code, 1860.
- ❖ The Juvenile Justice (Care and Protection of Children) Act. 2015.
- ❖ The Juvenile Justice (Care and Protection of Children) Rules. 2007.
- ❖ The Constitution of India, 1949.

### **TREATIES**

- ❖ United Nations Convention on the Rights of the Child, 1990

### **LEXICONS**

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- ❖ *Collin's Gem English Thesaurus*, 8th Edn. 2016. Collins.
- ❖ Catherine Soanes, *Oxford Dictionary Thesaurus*, 40<sup>th</sup> Edn. 2006, Oxford University Press.

### **LEGAL DATABASES**

- ❖ Manupatra
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- ❖ Indian Kanoon

**STATEMENT OF JURISDICTION**

The Petitioners have approached the Hon'ble Supreme Court of India under Article 136 of the Constitution of India. The leave has been granted by this Hon'ble court in both matters and both the matters are to be heard by this Hon'ble Supreme Court together. The article 136 of Constitution of India reads as hereunder:

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**“136. SPECIAL LEAVE TO APPEAL BY THE SUPREME COURT.**

*(1) Notwithstanding Anything In This Chapter, The Supreme Court May, In Its Discretion, Grant Special Leave To Appeal From Any Judgment, Decree, Determination, Sentence Or Order In Any Cause Or Matter Passed Or Made By Any Court Or Tribunal In The Territory Of India.*

*(2) Nothing In Clause (1) Shall Apply To Any Judgment, Determination, Sentence Or Order Passed Or Made By Any Court Or Tribunal Constituted By Or Under Any Law Relating To The Armed Forces.”*

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### **STATEMENT OF FACTS**

For the sake of brevity and convenience of the Hon`ble Court the facts of the present case are summarized as follows:

#### **BACKGROUND**

1. Shyama is a poor boy who used to live in a slum in the outskirts of the city of Brada in the Republic of Indiana. He studied in a government funded school named, Shanti Niketan School up to Sixth Standard but then he dropped out of school and since then, he has been in the employment of Mr. R. Batra. Shyama lives in the quarter provided by Mr. Batra. It has been 6 years since his employment.
2. Mr. R. Batra had two children, a boy named Ravi, aged 18 years and a girl named Vanita, aged 16 years. Shekhar Saxena, aged 17 years and 7 months is the Son of Mr. Saxena. Shekhar is the neighbor of Mr. Batra.
3. Shekhar and Ravi had hatred for each other since childhood. In light of this both had a heated quarrel. One day Shekhar was playing soccer in the park and Ravi & Vanita were jogging at the same time. While playing soccer, the football got hit over Vanita's head and she sustained some minor injuries. As a result, Ravi started verbally abusing Shekhar and this led to a heated quarrel between the two where Ravi gave a blow to Shekhar. Soon, the quarrel was resolved by one of the neighbors.
4. Both, Ravi and Vanita, used to insult Shyama in a condescending manner. Shyama was also abused and tormented in public. One day, Shekhar saw this and talked to Shyama. Both started sharing the hatred for Ravi and Vanita.

## **DEATH OF RAVI AND VANITA**

5. Shyama took a leave for 3 days on 7<sup>th</sup> March, 2015 for going to his village. He had the permission of Mr. Batra for the leave. On 8<sup>th</sup> March, 2015, Mrs. Batra had planned to go to a painting exhibition with her family but due to Mr. Batra's work she decided to go with her children. Shyama had prior knowledge of the same.
6. Mrs. Batra, with her children, reached the exhibition at 7:30 P.M. on 8<sup>th</sup> March, 2015. Around 8:30 P.M. Vanita was taken away by four persons. Ravi sensed this and he started searching for his sister. While searching, Ravi went to the basement and saw four persons. Two persons were holding her sister and the other two were trying to outrage her modesty.
7. Ravi tried to save his sister, however, he was suffered one blow on his head and several blows on his abdomen. As a result, he fell unconscious. His sister Vanita tried to scream, but her mouth was shut and in sudden haste she was strangulated. She fell dead and all the four persons fled away. The bodies of the deceased were discovered around 9:30 P.M by the guard who came down to the basement to switch off the lights.

## **JUDICIAL PROCEEDINGS**

8. Shekhar was arrested on 10<sup>th</sup> March, 2015 on the information of Ram Manohar who saw him sneaking out the basement on the night of 8<sup>th</sup> March, 2015. On the 12<sup>th</sup> March, 2015, Shyama was arrested along with Raju and Ranveer, who were Shekhar's friends.
9. On 15<sup>th</sup> May, 2015, the case was admitted to the Juvenile Board (*hereinafter* asJB) as all the boys were alleged to be below the age of 18 years. The case of Shekhar and Shyama was committed to the Sessions Court as the JB found them well aware of the

circumstances and consequences of their acts. Both of them were tried u/s 302,304,326,354 read with S. 34 of the Indian Penal Code (*hereinafter* as IPC).

10. On 12<sup>th</sup> June, 2015 Shekhar's case was remanded back to the JB. However, Shyama's submissions were rejected due to lack of evidence of age as his Birth Certificate provided by the Municipality could not be discovered. Shyama's assertion to carry out a Bone Test or any other allied test for the determination of his age was also rejected by the court due to inconclusiveness of these kinds of tests.
11. On 28<sup>th</sup> July, 2015, Shyama was found guilty u/s 304, 326, 354 read with S.34 of IPC, 1860. He was sentenced to imprisonment of 3 years. Shekhar was found guilty u/s 304, 326, 354 read with S. 34 of IPC, 1860 on 4<sup>th</sup> August, 2015 and he was sent to a special home for a maximum period of 3 years by the JB. Shekhar appealed to the Session court against the judgement and order passed by the Juvenile Board. However, the appeal was dismissed as the case had been proved beyond reasonable doubt before the Juvenile Board.
12. Both Shekhar and Shyama appealed to the High Court. Shyama filed an appeal against the order of conviction since the Court of Session had no jurisdiction to try the case as he was a minor. He also raised a question regarding the justification of the court in rejecting the bone test. Whereas, Shekhar filed an appeal for the quashing of the order of conviction of the Court. Both the appeals were rejected by the High Court as both were *capax* of committing the crime and both had common consensus. Shyama was sentenced for life imprisonment and Shekhar was sentenced for imprisonment of 10 years.
13. On 11<sup>th</sup> January, 2016, both the accused have petitioned before this Hon'ble Apex Court against the order of High Court and the Sessions Court. The matter is admitted and listed for hearing.

**ISSUES RAISED**

1. **WHETHER THE SPECIAL LEAVE PETITION BROUGHT BEFORE THIS COURT IS MAINTAINABLE OR NOT.**
2. **WHETHER THE SESSIONS & HIGH COURT WERE JUSTIFIED IN REJECTING THE BONE TEST.**
3. **WHETHER THE ACT OF SHEKHAR WAS IN FURTHERANCE OF COMMON INTENTION DEFINED UNDER S.34 OF IPC.**
4. **WHETHER THE ACT IS IN CONTRAVENTION WITH THE CONSTITUTION OF INDIA AND INTERNATIONAL NORMS.**

**SUMMARY OF ARGUMENTS**

**1. WHETHER THE SPECIAL LEAVE PETITION BROUGHT BEFORE THIS COURT IS MAINTAINABLE OR NOT.**

It is humbly submitted before this Hon'ble Court that the Special Leave Petition against the judgment of the Hon'ble High Court (*hereinafter* as HC) is maintainable under Article 136 of the Constitution of India. It is contended that the jurisdiction of Supreme Court (*hereinafter* as SC) under Article 136 can always be invoked when a question of law of general public importance arises and even question of fact can also be a subject matter of judicial review under Art.136.

The jurisdiction conferred under Art. 136 on the SC is a corrective one and not a restrictive one. A duty is enjoined upon the SC 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 SC to interfere with the same would amount to allowing the illegality. It has been held by this Hon'ble Court that when a question of law of general public importance arises, or a decision shocks the conscience of the court, its jurisdiction can always be invoked. Article 136 is the residuary power of SC to do justice where the court is satisfied that there is injustice to be perpetuated.

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

**2. WHETHER THE SESSIONS & HIGH COURT WERE JUSTIFIED IN REJECTING THE BONE TEST.**

It is submitted before this Honorable Court that the bone age of a child indicates his/her level of biological and structural maturity. In the present case, the plea to conduct a bone test or any other allied test for the determination of the age of Shyama was rejected by the Sessions & High Court. The reason for such decision to reject the above mentioned tests was due to the inconclusiveness of these kinds of tests.

This is an insufficient ground for rejecting to conduct the Age Determination Test. It is a well-accepted fact in the precedents of our Indian Judiciary that the last resort for age determination of a juvenile is the Bone Test i.e. Ossification Test. The "Age determination inquiry" conducted under Section-94(2) of the JJA, 2015 enables the court to seek evidence and in that process the court can obtain the matriculation or equivalent certificates, if available. The petitioner asserts that Shyama had time and again submitted before various lower courts the petition for determination of his age, and time and again it was denied to him.

**3. WHETHER THE ACT OF SHEKHAR WAS IN FURTHERANCE OF COMMON INTENTION DEFINED UNDER S.34 OF THE IPC.**

It is submitted before this honorable Court that in the present case there has been a gross failure of justice on part of the lower courts. There has been a grave error in convicting Shekhar solely on the basis of his mere presence at the exhibition. The Section 34 of IPC is intended to meet cases in which it may be difficult to distinguish between the acts of the individual members of a party or to prove what part was exactly taken by each of them in furtherance of the common intention of all. To constitute common intention it is

necessary that the intention of each one of the accused was known to the rest of them and was shared by them. The test to decide if the intention of one of them is common is to see whether the intention of one was known to the other and was shared by that other.

It is submitted that the co-accused Shekhar is being dragged into the picture for no justifiable cause and for no fault, participation or involvement of his in the alleged act in question. It is submitted that neither the accused had any intention with others nor did he act in concert with others to commit such act. There was no evidence that prior to the incident there was any common intention shared by both the accused. The said intention did not develop at the time of the incident as well.

**4. WHETHER THE ACT IS IN CONTRAVENTION WITH THE CONSTITUTION OF INDIANA AND INTERNATIONAL NORMS.**

It is respectfully submitted that the impugned Act seeks to punish the child in conflict with law for the failure of the society at large in providing the child with adequate care and protection. It is submitted that the impugned Act seeks to create a fictional classification between the children belonging to age group of 16-18 years on the basis of degree of crime "allegedly" committed by them.

It is submitted that under the Indian law a person under the age of 18 is not allowed to vote, is considered minor for entering into a contract, a girl of age less than 18 cannot give consent for sexual relationships, a child of age less than 18 cannot marry, yet, by the amended act, that child can be tried as an adult and after a preliminary assessment, the child shall be presumed to have the knowledge and understanding of the alleged crime he has committed. The counsel submits that such a scenario would be travesty of Justice.

The law of juvenile justice stands on the principles of restorative and reformatory justice and any digression from the same would be detrimental to the right of the children and in contravention with the principle as enunciated under Article 15(3) of the Constitution of India

The counsel humbly submits that the impugned amendment is against the UN Convention on the Rights of the Child (*hereinafter* as UNCRC) which is a comprehensive and internationally binding agreement on the rights of children. It was adopted by the United Nations General Assembly in 1989.

The Petitioner submits that our country accepts the international convention of keeping 18 years as the age of the child and the same is reflected in various laws where the age of child was kept at 18 years such as Contract Act, Motor Vehicles Act, etc.

**ARGUMENTS ADVANCED**

**1. WHETHER THE SPECIAL LEAVE PETITION BROUGHT BEFORE THIS COURT IS MAINTAINABLE OR NOT.**

It is humbly submitted that the Special Leave Petition against the judgment of Hon'ble High Court is maintainable under Article 136 of the Constitution of India. It is contended that the jurisdiction of Supreme Court under Article 136 can always be invoked when a question of law of general public importance arises and even question of fact can also be a subject matter of judicial review under Art.136.

**1.1 JURISDICTION OF SC UNDER ARTICLE 136 CAN ALWAYS BE INVOKED WHEN A QUESTION OF LAW OF GENERAL PUBLIC IMPORTANCE ARISES.**

The jurisdiction conferred under Art. 136 on the SC are corrective one and not a restrictive one<sup>1</sup>. A duty is enjoined upon the SC 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 SC to interfere with the same would amount to allowing the illegality to be perpetuated<sup>2</sup>. It has been held in plethora of cases that when the question of law of general public importance arises, the jurisdiction of SC can be invoked by filing special leave petition. In the present case, the issue involves matter of General Public Importance and hence, entitled to be maintainable.

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<sup>1</sup>*Haryana State Industrial Corporation. v. Cork Mfg. Co.* (2007) 8 SCC 359.

<sup>2</sup>*Pawan Kumar v. State of Haryana*, (2003)11 SCC 241.

**1.1.1 THE MATTER INVOLVES QUESTION OF LAW OF GENERAL PUBLIC IMPORTANCE AND HENCE, ENTITLED TO BE MAINTAINABLE.**

It has been held by this Hon'ble Court that when a question of law of general public importance arises, or a decision shocks the conscience of the court, its jurisdiction can always be invoked. Article 136 is the residuary power of SC to do justice where the court is satisfied that there is injustice<sup>3</sup>. The principle is that this court would never do injustice nor allow injustice being perpetrated for the sake of upholding technicalities<sup>4</sup>. In any case, special leave would be granted from a second appellant decision only where the judgment raises issue of law of general public importance<sup>5</sup>

In the case at hand, requisite and proper inquiries were not conducted regarding the age of the Shyama and creditworthiness of the witness and the judgement was passed without conducting proper inquiry and collection of evidences. Also the juveniles in conflict with law have been punished arbitrarily. This has disturbed the public. Hence, the matter concerned is of great public importance and the same was reiterated by the High court.

Hence, considering all the above authorities, it is humbly submitted before this court that the matters involves question of law of general public importance and therefore, the appeal is maintainable under article 136 of the Constitution of Indiana.

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<sup>3</sup>*C.C.E v Standard Motor Products*, (1989) AIR 1298.

<sup>4</sup>*Janshed Hormusji Wadia v Board of Trustees, Port of Mumbai* (2004)3 SCC 214.

<sup>5</sup>*Balakrishna v. Rmaswami*, (1965) AIR 195.

**1.1.2 THE MATTER INVOLVES SUBSTANTIAL QUESTION OF LAW  
AND HENCE ENTITLED TO BE MAINTAINABLE**

Where findings are entered without considering relevant materials and without following proper legal procedure, the interference of the Supreme Court is called for<sup>6</sup>. The expression "substantial question of law" 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<sup>7</sup>.”*

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

The Supreme Court is not precluded from going into the question of facts under article 136, if it considers it necessary to do so<sup>8</sup>. The Article 136 uses the wording ‘in any cause or matter’. This gives widest power to this court to deal

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<sup>6</sup>*Dale & Carrington Investment Ltd. v. P.K. Prathapan* (2005) 1 SCC 212.

<sup>7</sup>*Sir Chunilal Mehta and Sons. Ltd. v. Century Spinning and Manufacturing Co. Ltd.* (1962) AIR 1314.

<sup>8</sup>*Kathi Raning Rawat v. The State of Saurashtra* (1952) AIR 991.

with any cause or matter<sup>9</sup>. It is, plain that when the Supreme 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<sup>10</sup>

It is submitted that, the present facts in issue satisfy all of the above mentioned criteria. The case involves the matter of general public importance and it directly and substantially affects the rights of the parties as the order is erroneous and prejudicial to the interest of the petitioners. Also, in the light of the facts that huge amount of cases aroused under same facts and circumstances, it is submitted that the question is indeed an open question.

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<sup>9</sup> *Pritam Singh v. The State*, (1950) AIR 169.

<sup>10</sup> *Sripur Paper Mills v. Commissioner of Wealth Tax* (1970) AIR1520.

**2. WHETHER THE SESSIONS & HIGH COURT WERE JUSTIFIED IN  
REJECTING THE BONE TEST**

It is submitted before this Hon'ble Court that the bone age of a child indicates his/her level of biological and structural maturity. By the age of 18 years, bone age cannot be computed from hand & wrist radiographs, therefore the medial end of the clavicle is used for bone age calculation in individuals aged 18—22 years. In the present case, the plea to conduct a bone test or any other allied test for the determination of the age of Shyama was rejected by the Sessions & High Court. The reason for such decision to reject the above mentioned tests was due to the inconclusiveness of these kinds of tests<sup>11</sup>. This is an insufficient ground for rejecting to conduct the Age Determination Test.

The Juvenile Justice (Care and Protection of Children) Act, 2015 states that,

*(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining —*

*(i) The date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;*

*(ii) The birth certificate given by a corporation or a municipal authority or a panchayat;*

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<sup>11</sup> Fact Sheet, ¶11, Line 7.

*(iii) And only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board<sup>12</sup>”*

It is a well-accepted fact in the precedents of our Indian Judiciary that the last resort for age determination of a juvenile is the Bone Test i.e. Ossification Test. The "Age determination inquiry" conducted under Section-94(2) of the JJA, 2015 enables the court to seek evidence and in that process the court can obtain the matriculation or equivalent certificates, if available. If there is an absence of both, matriculation or equivalent certificate and the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable. In case the exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of two years.

There have been cases where the criminal justice system has not recognized an accused to be a juvenile, and the claim of juvenility is raised for the first time before the Supreme Court. In the case of *Gopinath Gosh v. State of West Bengal*<sup>13</sup> the question to determine the age of the accused was raised for the first time in the case before the Supreme Court. The Apex Court instructed the Magistrate to conduct an inquiry about age when it appeared that the accused was under 21 years of age at the time when he committed the offence. As a result, the accused was found to be a juvenile at the time of commission of the offence. The Apex court observed that, “If necessary, the Magistrate may refer the accused to the

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<sup>12</sup> Section 94, Juvenile Justice (Care and Protection) Act. 2015.

<sup>13</sup>AIR 1984 SC 237.

Medical Board or the Civil Surgeon, as the case may be, for obtaining credit worthy evidence about age<sup>14</sup>.”

### **2.1 THE BONE TEST IS A RELIABLE SOURCE**

The petitioner asserts that Shyama had time and again submitted before various lower courts the petition for determination of his age, and time and again it was denied to him. As per experts that there can be error of about two years in the age determined by the ossification test, but it is still more reliable than ascertaining the age on mere appearance basis. In case of doctor's opinion regarding age of petitioners, benefit of plus/minus two years to be given<sup>15</sup>.

On request of the petitioner the Magistrate had directed the Superintendent of sub-Jail to send ossification report. On the basis petitioner's age was held not below 18 years. Courts below had wrongly relied on the report without giving margin of 2-3 years. If two views were possible regarding age of petitioner, one favorable to him should be accepted. It was obligatory on part of Magistrate to hold enquiry and determine the age after providing opportunity of hearing to the parties<sup>16</sup>.

### **2.2 THE LOWER COURT IS NOT JUSTIFIED FOR DENYING THE OSSIFICATION TEST AS A RIGHT TO SHAYAMA**

The petitioner asserts that, the order passed by the Session Court on the ground of 'inconclusiveness of these kinds of tests<sup>17</sup>' is an insufficient ground for rejecting to

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<sup>14</sup> *Gopinath Ghosh v. State of Bengal*, AIR 1984 SC 237.

<sup>15</sup> *Shehzad v. State (NCT of Delhi)*, 2006 (3) JCC 1580.

<sup>16</sup> *Ummeed Singh v. State of M.P.*, 2007 (57) AIC 849 (MP) (Gwalior Bench).

<sup>17</sup> Fact Sheet, ¶11, Line 7.

conduct age ascertainment test. The petitioner asserts that, the accused i.e., Shekhar had time and again submitted before various lower courts the petition for determination of his age, and time and again it was denied to him.

Ossification test is performed by radiological examination of several main joints, and the opinion of age is based on the extent of fusion of the bones<sup>18</sup>. The foundation of the Indian criminal justice system is that any doubt or ambiguity should support the accused. Hence, in borderline cases the accused is to be treated as a juvenile. Moreover, the Supreme Court has held that the approach of the courts should not be hyper-technical whilst determining juvenility<sup>19</sup>.

The judicial trend has more been diverted from *Surinder Singh's Case*<sup>20</sup>, when the Supreme Court rejected a plea of juvenility that was for the first time raised before Apex Court. Legislature intervened by amending JJA 2000 to assure juveniles the envisaged treatment. Section 7-A was inserted to clarify the courts should entertain at any stage, even after final disposal of the case, a plea that an accused was below 18 years of age at the time of occurrence of the crime.

It is most respectfully submitted to the Court that, where the declaration as to whether the accused was juvenile or not has not been given by any competent Court, the matter was remanded to the concerned Court for determining the age of the petitioner and for passing order on the point of juvenile and in connection with the pending case against the petitioner<sup>21</sup>.

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<sup>18</sup>*Jaya Mala vs. Home Secretary, Govt. Of J&K*, AIR 1982 SC 1297.

<sup>19</sup>*Bhoop Ram vs. State of U.P.* AIR 1989 SC 1329.

<sup>20</sup>*Surinder Singh vs. State of U.P.*, AIR 2003 SC3811.

<sup>21</sup>*Hemal Jain vs. State of Jharkhand*, 2004 Cr. LJ. 3830 (Cal).

**3. WHETHER THE ACT OF SHEKHAR WAS IN FURTHERANCE OF COMMON INTENTION DEFINED UNDER S.34 OF IPC.**

It is submitted before this honorable Court that in the present case there has been a gross failure of justice on part of the lower courts. There has been a grave error in convicting Shekhar solely on the basis of his mere presence at the exhibition. The Section 34 of the Indian Penal Code, 1860 states;

*“When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone<sup>22</sup>.”*

This section is intended to meet cases in which it may be difficult to distinguish between the acts of the individual members of a party or to prove what part was exactly taken by each of them in furtherance of the common intention of all.<sup>23</sup>The reason why all are deemed guilty in such cases is that the presence of accomplices gives encouragement, support and protection to the person actually committing an act.

The essential ingredients of Sec. 34 of IPC as stated and restated by law Courts in plethora of cases are:

- (i) Common intention to commit a crime, and
- (ii) Participation by all the accused in the act or acts in furtherance of the common intention. These two things establish their joint liability.<sup>24</sup>

This provision is only a rule of evidence and does not create a substantive offence. It lays down the principle of joint liability. To charge a person under this section, it must be

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<sup>22</sup> Section 34, Indian Penal Code.

<sup>23</sup> *Mepa Dana*, (1959) Bom LR 269.

<sup>24</sup> *Shaik China Brahman v. State of A.P.*, AIR 2008 SC 610.

shown that he shared a common intention with another person or persons to commit a crime and subsequently the crime was perpetrated<sup>25</sup>. The Apex Court held in a case<sup>26</sup>, that in the case of Sec. 34 it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all.

To constitute common intention it is necessary that the intention of each one of the accused was known to the rest of them and was shared by them. The test to decide if the intention of one of them is common is to see whether the intention of one was known to the other and was shared by that other. In drawing the inference the true rule of law which is to be applied is the rule which requires that guilt is not to be inferred unless that is the only inference which follows from the circumstances of the case and no other innocuous inference can be drawn.<sup>27</sup>

In a case where the accused persons on going together to a village attacked a victim and caused his death and after having achieved the object tried to escape together, they act in close concert and harbour the common intention of beating the deceased. To such a case Section 34 does apply.<sup>28</sup> 'Common intention' is not the same or similar intention. It follows that there must be a prior meeting of the minds. Several persons can simultaneously attack a man. Each can have the same intention, that is, intention to kill. Each can individually cause a separate fatal blow. Yet, there may not exist a common

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<sup>25</sup> *Garib Singh v. State of Punjab*, 1972 Cr LJ 1286.

<sup>26</sup> *Pandurang v. State of Hyderabad*, AIR 1955 SC 216.

<sup>27</sup> *Oswal Danji v. State*, (1960) 1 Guj LR 145.

<sup>28</sup> *Bherusingh v. State*, 1956 Madh. BLJ 905.

intention if there was no prior meeting of the mind. In such a case, each would be individually liable for the injuries, he causes.<sup>29</sup>

### **3.1 ABSENCE OF COMMON INTENTION**

It is submitted that the co-accused Shekhar is being dragged into the picture for no justifiable cause and for no fault, participation or involvement of his in the alleged act in question. It is submitted that neither the accused had any intention with others nor did he act in concert with others to commit such act.

‘Common intention’ implies a pre- concerted plan and acting in concert pursuant to the plan. Common intention comes into being prior to the commission of the act in point of time, which need not be a long gap.<sup>30</sup> Though establishing common intention is difficult for the prosecution, yet, however difficult it may be, the prosecution has to establish by evidence, whether direct or circumstantial that there was a plan or meeting of mind of all the assailants to commit the offence, be it pre-arranged or the spur of the moment, but it must necessarily be before the commission of the crime.

There was no evidence that prior to the incident there was any common intention shared by both the accused. The said intention did not develop at the time of the incident as well and therefore, it was held that Sec. 34 of the Indian Penal Code cannot be resorted to hold accused guilty of any crime<sup>31</sup>.

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<sup>29</sup> *Nandu & Dhaneshwar Naik v. The State*, 1976 CriLJ 250.

<sup>30</sup> *Ramchander & Ors. v. The State of Rajasthan*, 1970 CrLJ 653.

<sup>31</sup> *Veer Singh v. State of U.P.*, 2010 (1) A.C.R. 294 (All.).

Therefore, it is humbly submitted that there was no common intention among Shekhar and the others accused. Hence, in absence of common intention he must not be held liable under S.34 of the IPC.

### **3.2 THE ACT WAS NOT IN FURTHERANCE OF COMMON INTENTION**

In view of the phraseology of S. 34 existence of common intention is not enough, the criminal act impugned to attract S.34 must be committed in furtherance of common intention. The section operates only when it is found that the criminal act done by an individual is in furtherance of the common intention and not without it<sup>32</sup>. The words 'in furtherance of the common intention of all' in S.34, IPC do not require that in order that the section may apply, all participants in the joint acts must either have common intention of committing the same offence or the common intention of producing the same result by their joint act be performed.

It is true that no concrete evidence is required to prove a common intention between two people to commit an act. It is however key here to understand that such evidence must be such that it does not leave any room for doubt against such an intention.<sup>33</sup> Moreover, to sustain a charge under s. 34, active participation in the commission of the criminal act is required which is clearly absent in the present case.<sup>34</sup>

The petitioner submits that since the aforementioned two essential conditions have not been met with in the present. It is further submitted that the accused must not be held liable under S.34 of IPC.

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<sup>32</sup> *State of Bihar v. Lala Mahto* A.I.R 1955 pat. 161.

<sup>33</sup> *Dharam Pal v. State of Haryana*, AIR 1978 SC 1492.

<sup>34</sup> *William Slaney v. State of Madhya Pradesh*, AIR 1956 SC 116.

**4. WHETHER THE ACT IS IN CONTRAVENTION WITH THE CONSTITUTION OF INDIANA AND INTERNATIONAL NORMS.**

It is respectfully submitted that the impugned Act seeks to punish the child in conflict with law for the failure of the society at large in providing the child with adequate care and protection. It is submitted that the impugned Act seeks to create a fictional classification between the children belonging to age group of 16-18 years on the basis of degree of crime "allegedly" committed by them.

It is submitted that as per the scheme of the amendment act the Juvenile Justice Board under section 15<sup>35</sup> of the Act will have an arbitrary power to conduct a preliminary inquiry to determine whether a juvenile offender is to be sent for rehabilitation or be tried as an adult. It is submitted that such classification does not adhere to or does not have any nexus with the objective sought to be achieved. It is submitted that the impugned Act has been brought in place in a knee jerk manner and without keeping in mind the interest of the children.

The NCRB data relied upon by the Parliament shows a minute increase of 0.9% in juvenile crime since 2003. It is pertinent to mention herein that the abovementioned data merely reflects the number of FIR registered and not the conviction. Further, for heinous offences like rape, the data shows that in year 2013 out of total rape cases registered only 5% of the rape crimes were allegedly committed by children belonging to the age group of 16-18<sup>36</sup>.

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<sup>35</sup> Section 15, Juvenile Justice (Care and Protection) Act, 2015 – Preliminary assessment into heinous offences by Board.

<sup>36</sup> *Crime in India - 2013*, National Crime Records Bureau, 2014.

It is submitted that under the Indian law a person under the age of 18 is not allowed to vote, is considered minor for entering into a contract, a girl of age less than 18 cannot give consent for sexual relationships, a child of age less than 18 cannot marry, yet, by the amended act, that child can be tried as an adult and after a preliminary assessment, the child shall be presumed to have the knowledge and understanding of the alleged crime he has committed. The counsel submits that such a scenario would be travesty of Justice.

#### **4.1 THE ACT IS IN CONTRAVENTION WITH THE ARTICLE 15(3) OF THE CONSTITUTION OF INDIA**

It is submitted that the impugned Act is in violation of Article 15(3) of the Constitution of India<sup>37</sup>. It is submitted that the stated object of the Act is for the welfare of children, however, the amendment passed makes the legislation draconian and against the idea of welfare of children. There is no need to subject the children to different or adult judicial system as it will go against 15(3) of the Constitution of India.

It is submitted that the idea behind treating a certain age group as children is to protect the most vulnerable section of the society. In case a crime is committed by the children, the endeavour of the state should be reformative rather than punitive or worse retributive. The law of juvenile justice stands on the principles of restorative and reformative justice and any digression from the same would be detrimental to the right of the children and in contravention with the principle as enunciated under Article 15(3) of the Constitution of India.

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<sup>37</sup> Article 15(3), Constitution of India, 1949 - Nothing in this article shall prevent the State from making any special provision for women and children.

**4.2 THE ACT IS IN CONTRAVENTION WITH THE UN CONVENTION ON  
THE RIGHTS OF THE CHILD**

The counsel humbly submits that the impugned amendment is against the UN Convention on the Rights of the Child (*hereinafter* as UNCRC) which is a comprehensive and internationally binding agreement on the rights of children. It was adopted by the United Nations General Assembly in 1989. The definition of child as envisaged in Article-1 states:

*"For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."*

The object clause of the present amendment states thus:

*"And whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of child."*

The counsel submits that the mention of UNCRC in the objective of the impugned amendment is a mere eye wash as the amendment seeks to erode the very definition of child as envisaged in the UNCRC. The counsel further submits that section 16<sup>38</sup> of the Act of 2000 had a specific provision to deal with children between 16-18 years who had committed serious offences which was well within the existing juvenile system and that there was no need to push juvenile offenders into adult criminal system.

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<sup>38</sup> Section 16, Juvenile Justice Act. (2000) - Order that may not be passed against juvenile.

The counsel submits that our country accepts the international convention of keeping 18 years as the age of the child and the same is reflected in various laws where the age of child was kept at 18 years such as Contract Act, Motor Vehicles Act, etc.

In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity<sup>39</sup>.

The age of eighteen has been fixed on account of the understanding of experts in child psychology and behavioural patterns that till such an age the children in conflict with law could still be redeemed and restored to mainstream society, instead of becoming hardened criminals in future. There are, of course, exceptions where a child in the age group of sixteen to eighteen may have developed criminal propensities, which would make it virtually impossible for him/her to be re-integrated into mainstream society, but such examples are not of such proportions as to warrant any change in thinking, since it is probably better to try and re-integrate children with criminal propensities into mainstream society, rather than to allow them to develop into hardened criminals, which does not augur well for the future<sup>40</sup>.

Further, the Child shall be forced to face trial which will have negative effect on the psychology of the child. Under the previous law, if a child, in conflict with law, between the ages of 16-18 years was found to have committed an offence by the Juvenile Justice Board, there was a range of rehabilitative dispositions that could be passed by the Juvenile Justice Board. These rehabilitative dispositions included admonition, community service, imposition of a fine, probation, group counselling and an extreme measure of deprivation of liberty by way of placement of the child in a special home for three years.

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<sup>39</sup> *Subramanian Swamy v. Raju*, (2014) 8 SCC 390.

<sup>40</sup> *Salil Bali v Union of India*, (2013) 7 SCC 705.

United Nations Convention on the Rights of the Child, 1990 read with the concluding Resolution of the Committee on Child Rights (constituted under the UN Convention) of the year 2000 and the General Resolution of the year 2007 clearly contemplate the MACR as 18 years and mandates member States to act accordingly. The UN Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”) were adopted by the General Assembly of the United Nations in 1985. Rule 2.2(a) defines a juvenile as a child or young person who, under the respective legal system, may be dealt with for an offence differently than an adult. Rule 4.1 set out below mandates Member States to refrain from fixing a minimum age of criminal responsibility that is too low, bearing in mind the facts of emotional, mental and intellectual maturity.

Lastly, the counsel herein submits that the brain of the teenager is not completely developed and he/she is incapable of fully understanding the consequences of his actions or omissions. Furthermore, it is submitted before this Hon’ble court that in the present case the act in question is in contravention with the Constitutional provisions of the Constitution of India as well as it is also not in consonance with the principles of the UNCRC.

**PRAYER**

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In the light of the issues raised, arguments advanced and authorities cited, may this Hon'ble Court be pleased to:

1. Set aside the conviction of Shekhar and free him from all the charges framed upon him.
2. Hold that the case of Shyama be remanded back to the Juvenile Justice Board for his trial as a minor.
3. Hold that the Ossification Test of Shyama be conducted for the determination of his age.
4. Hold that the Juvenile Justice (Care and Protection) Act, 2015 is in contravention with Constitution of India and the International Conventions.

AND/OR

Pass any 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.

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COUNSELS ON BEHALF OF THE PETITIONER