

SUPREME COURT OF INDIA

Zakarius Lakra

Vs.

Union of India

Writ Petition (Crl) No. D20026 of 2004

(P.Venkatarama Reddi and A.K.Mathur JJ.)

16.02.2005

ORDER

1. By this Writ Petition under Article 32 of the Constitution, the petitioners, who are the parents of the appellant in Criminal Appeal No. 824 of 2002, question the legality of the death sentence imposed on the appellant by the Additional Sessions Judge, Dehradun which was confirmed by the High Court on reference made to it and further confirmed by this Court on the appeal filed by the appellant. The petitioners prayed for quashing the death sentence on the ground that the appellant was a juvenile on the date of the commission of the offence i.e. 15.11.1994. According to the school certificate produced as 'additional evidence' along with this petition, his date of birth is 4.1.1980. It transpires that along with the memorandum of appeal, the appellant did file two certificates dated 28.4.2001 and 2.8.2002 issued by School authorities in West Bengal to the same effect but they were not brought to the notice of the Bench at the time of hearing of the appeal. It is not known whether it formed part of the relevant record furnished by the Registry to the amicus curiae who pleaded the case of the appellant. It is on the basis of this material that the learned counsel for the petitioners submits that the imposition of death sentence is not proper.

2. We would like to make it specifically clear that the learned counsel for the petitioners stated that he is not seeking for re-opening of the trial and for setting aside the conviction. He submitted that the limited relief sought for in this writ petition is to modify the death sentence to life imprisonment having regard to the age of the accused on the relevant date. Learned counsel submits that the genuineness and authenticity of the certificate can be got verified by directing an enquiry by named authority or Court.

3. A review petition was filed by the convicted appellant. In the review petition, the grounds raised were in regard to the age of the accused-appellant. In one of the grounds, it was pointed out that the school certificate filed by the petitioner along with the appeal was not taken into consideration. The learned counsel for the petitioners submits that apparently, this particular ground taken in the review petition would not have been noticed by the Court. The review petition was dismissed.

4. In view of the decision of this Court in *Rupa Ashok Hurra vs. Ashok Hurra*¹ this petition under Article 32 is not maintainable. The appropriate remedy is only to file a curative petition as per the procedure indicated by this Court in the said decision. Accordingly, we permit the petitioners to convert the present petition into curative petition by making necessary amendments and following due procedure.

5. Before closing, we may point out that the trial Court while hearing the accused on the question of sentence noted the submission of the accused that his age was 17 years on the date of occurrence and then answered the same as follows:

"His attention was drawn to the pass-book and the cheque-book and was appraised of the fact that the account could have been opened by him only if he had been major. Then he conceded the factum of majority on the date of occurrence."

The contention regarding age of appellant was also dealt with by this Court who reads as follows:

"12. Regarding the age of the appellant, a contention has been raised that he was juvenile at the time of commission of crime on 15.11.1994 because he gave the age of 20 years in his statement recorded under Section 313 Cr.P.C. on 7.3.2001. Apart from the fact that on behalf of the appellant no proof was adduced regarding his age, the High Court noted that he admittedly opened the bank account in Punjab National Bank at Dehradun on 9.3.1994. The passbook and the cheque book were exhibited in trial. The High Court observed that the appellant would not have been in a position to open the account unless he was a major and declared himself to be so. That was also the view taken by the trial Court. The approach of the trial Court as well as the High Court on this aspect cannot be faulted."

As already noted, the said conclusion was reached by the Bench (of which one of us was a member) without looking into the school certificate annexed to the memorandum of appeal.

6. We may also mention that the learned counsel for the petitioners has referred to the decisions of this Court in *Raj Singh vs. State of Haryana*) and *Gopinath Ghosh vs. State of West Bengal*) wherein the plea of the offender being juvenile was entertained for the first time in this Court and appropriate relief was given. The learned counsel has also drawn our attention to the observations in *Ramdeo Chauhan vs. State of Assam* 70) wherein R.P. Sethi, J. with whom Phukan, J. concurred observed as follows in paragraph 6:

"The contentions raised and the prayer made are admittedly beyond the scope of review. This petition can be dismissed only on this ground. However, being the case of death sentence, we have decided to consider the whole matter in depth to ascertain as to whether the petitioner is entitled to the benefit of the Act or not. We have further opted to consider that even if he is not proved to be juvenile, can he be given the

benefit of his age on the ground of his allegedly being on the borders of the age contemplated under the Act for the purposes of awarding him the alternative sentence of imprisonment for life."

Thomas, J. in his dissenting opinion, after referring to the doctor's opinion of age in paragraphs 52 and 53 observed as follows:

"When the possibility of the petitioner having been a juvenile on the relevant date cannot be excluded from the conclusion by adopting such reasonable standards, the interdict contained in Section 22(1) of the Juvenile Act cannot be bypassed for awarding death penalty to the petitioner so long as the death penalty is permitted to survive Article 21 only if the lesser alternative can be foreclosed unquestionably. In other words, if the age of the petitioner cannot be held to be unquestionably above 16 on the relevant date its corollary is that the lesser sentence also cannot unquestionably be foreclosed. We have to abide by the declaration of law made by the majority of judges of the Constitution Bench in Bachan Singh case.

For the aforesaid reasons, I am persuaded to allow this review petition and after the sentence of death to imprisonment for life."

That case arose out of the review petition filed by the accused-appellant.

7. We have only considered it appropriate to refer to the contentions raised and citations given by the learned counsel so that they may receive due consideration when the curative petition is taken up for consideration by the larger Bench.

8. The Writ Petition is dismissed subject to the observations made above, without prejudice to the remedy left open to the petitioners to file curative petition.

¹(2002) 4 SCC 388)