

Ishtikhar

v.

State of U.P

(Supreme Court Of India)

HON'BLE MR. JUSTICE H.L. DATTU HON'BLE MR. JUSTICE ANIL R. DAVE

Criminal Appeal No. 694 Of 2012 (Arising Out Of Slp (Cri.) No. 261 Of 2012) | 24-04-2012

1. Leave granted.

2. This appeal is directed against the Judgment & order passed by the High Court of judicature at Allahabad in the second bail application preferred by the Appellant herein in Criminal Appeal No.4380 of 2007 dated 09.08.2011. By the impugned Judgment, the High Court has observed that the said application filed by the Appellant, inter alia, claiming himself to be a juvenile at the time of the incident, would be considered at the time of hearing of the main appeal on merits.

3. The Appellant is convicted & sentenced by the judgement & Order Dated 04/05.6.2007 passed by Learned Additional Sessions Judge, Saharanpur, in Sessions Trial No. 687 of 1998 under Section 302 read with Section 34 of the Indian Penal Code. The Learned Judge has imposed a punishment of Rigorous Imprisonment of life along with a fine of Rs.500. The Appellant was also convicted under Section 25 of the Arms Act & sentenced to undergo rigorous imprisonment for one year. Aggrieved by the order so made, the Appellant & others have approached the High Court by way of Criminal Appeal under Section 374(2) of the Code of Criminal Procedure. During the pendency of the appeal, the Appellant has preferred an application, inter alia, claiming that he was a juvenile, as defined under the provisions of the Juvenile Justice (Care & Provisions of Children) Act, 2000 ('the Act' for short) & accordingly requested the Court to invoke the provisions of the Act & grant him the relief. The Court, white considering the aforesaid prayer made in the application has merely observed that the request made in the application would be considered by the Court at the time of final hearing of the appeal. It is this observation of the Court that has brought the Appellant before us in this appeal.

4. We have heard the Learned Counsel of the parties to the lis. We have also perused the Judgment & order passed by the High Court. Further, we have carefully gone through the provisions of the Act & the Rules framed thereunder. A bare perusal of the Act & the Rules framed thereunder would give a clear indication that whenever a claim is made that a person was juvenile at the time of the incident, the same has to be considered at the earliest by following the provisions of the Act & the Rules framed thereunder the same cannot be postponed till the appeal is finally heard.

5. In our considered view, the entire object & purpose of the Juvenile Justice Act which is in the nature of beneficial legislation, would be defeated & frustrated, if the application for determination of the Juvenility of the accused is postponed indefinitely. The determination of accrual of benefits under this Act must be ascertained at earliest, otherwise it would amount to depriving a person, in case his juvenility at the time of offence is confirmed, from enjoying his legal & constitutional rights & protection flowing from this Act. Therefore. Section 7 A of the Act is very wide in the ambit to encompass the ascertainment of the question of juvenility of an accused/person, at any stage even after the disposal of the case.

6. This Court in *Pratap Singh v. State of Jharkhand*, (2005) 3 SCC 551, had considered the object of the Act & importance of time bound determination of the question of juvenility of the accused. This Court has held:

"77. The said Act is not only a beneficent legislation, but also a remedial one. The Act aims at grant of care, protection & rehabilitation of a juvenile vis-a-vis the adult criminals, Having regard to Rule 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, it must also be borne in mind that the moral & psychological components of Criminal responsibility were also one of the factors in defining a juvenile. The first objective, therefore, is the promotion of the well being of the juvenile & the second objective to bring about the principle of proportionality whereby & whereunder the proportionality of the reaction to the circumstances of both the offender & the offence including the victim should be safeguarded, In essence, Rule 5 calls for no less & no more than a fair reaction in any given case of juvenile delinquency & crime, The meaning of the expression "juvenile" used in a statute by reason of its very nature has to be assigned with reference to a definite date. The term "juvenile" must be given a definite connotation. A person cannot be a juvenile for one purpose & an adult for other purpose. It was, having regard to the constitutional & statutory scheme, not necessary for Parliament to specifically state that the age of juvenile must be determined as on the date of commission of the offence. The same is inbuilt in the statutory scheme, The statute must be construed having regard to the scheme & the ordinary state of affairs & consequences flowing therefrom. The modern approach is to consider whether a child can live up to the moral & psychological components of criminal responsibility, that is, whether a child, by virtue of his or her individual discernment & understanding can be held responsible for essentially antisocial behavior.

78. In construing a penal statute , the object of the law must be clearly borne in mind. The importance of time-bound investigation & trial in relation to an offence allegedly committed by a juvenile is explicit as has been dealt with in some detail hereinbefore. While making investigation it is expected that the accused would be arrested forthwith. He, upon his arrest; if he appears to be a juvenile, cannot be kept in police custody & may be released on bail. If he is not released on bail by the arresting authority, he has to be produced before the competent Court or Board. Once the appears to be juvenile, the competent Court and/or Board may pass an appropriate order upon releasing him on bail or send him to a replicative

custody. An inquiry for the purpose of determination of age of the juvenile need not be resorted to if the person produced is admitted to be juvenile. An inquiry would be necessary only if a dispute is raised in that behalf. A decision thence is required to be taken by the competent Court and/or Board having regard to the status of the accused as to whether he is to be released on bail or sent to a protective custody or remanded to police or judicial custody. For the said purpose, what is necessary would be to find out as to whether on the date of commission of the offence, he was a juvenile or not as otherwise the purpose for which the Act was enacted would be defeated. The provisions of the said Act, as indicated hereinbefore, clearly postulate that the necessary steps in the proceedings are required to be taken not only for the purpose of adopting a special procedure at the initial stage but also for the proceedings. If the person concerned is a juvenile, he cannot be tried along with other adult accused. His trial must be held by the Board separately. Having regard to Rule 20.1 of the Rules his case is required to be determined, without any unnecessary delay.” [Emphasis supplied by us]

7. Further more, in *Vimial Chadha v. Vikas Chaudhary* (2008) 15 SCC 216 Court has observed thus:

“11. The age of a “juvenile in delinquency” must be determined as & when an application is filed.”

8. Further, we are of the opinion that the determination of the juvenility of the accused is a jurisdictional question for the Courts to proceed on the merits of the case. Therefore, it is always desirable for the Courts to determine the question of juvenility at the first instance. In this regard Section 7 A (2) provides that if the accused is found juvenile at the time of offence, even after the sentence has been passed by a Court, then such sentence would be deemed to have no effect & accused would be forwarded to the juvenile board for appropriate orders.

9. The *Corpus Juris Secundum* (43 C.J.S. Infants § 27), has considered in detail that the question of determination of the age of the offender is the jurisdictional issue before the Courts.

“ § 27. Jurisdiction of Courts to try or prosecute offenders-Age at time of commissions of offense

Whether an offender is under or over the statutory age below which he or she is to be treated as a delinquent, & not as criminal, is determined, in some jurisdictions, by his or her age at the time of the commission of the offense, & not at the time of the indictment or trial, & in other jurisdictions, a contrary rule is followed.

The legislature has the power to fix the age of criminal responsibility, & in order to justify a proceeding against an offender as a delinquent, he or she must fall within the classification as to age prescribed by the statute.

Whether an offender is to be regarded as under or over the statutory age below which he or she is exempt from criminal prosecution & must be proceeded against as a delinquent is determined, in some jurisdictions, by his or her age at the time of the commission of the offense, & not at the time of the indictment or trial. In other jurisdictions, the question is determined not by his or her age at the time of the commission of the offense, but time of trial or of the institution of proceedings against him or her, & jurisdiction is determined by the age of the offender at the time of the charge, & not by the age at the time the trial is completed or a Judgment entered.

Hence, the criminal Court may exercise jurisdiction over a minor who has reached his or her majority at the time he or she is charged with a crime, even though the offense was committed when he or she was in his or her minority. Under some statutes, when a juvenile cause is pending & not heard on the merits prior to the time the juvenile reaches his or her majority, the juvenile Court loses jurisdiction over the cause. However, when the accused is a juvenile at the time of the commission of the crime & proceedings against him or her are pending in a juvenile Court, a criminal Court is without jurisdiction to proceed against him or her even though he or she had attained his or her majority before he or she was indicted. Similarly, a circuit Court cannot exercise jurisdiction over an alleged child offender who has not appeared in the juvenile Court before reaching his or her majority, in the absence of a waiver of jurisdiction by the juvenile Court.

Age of offender as jurisdictional question.

Whether the accused is within the age prescribed for juvenile Court treatment is a jurisdictional question, which the Court may, & according to some authorities, should, or must, pass on instead of submitting it to the jury, & in the determination of which the Court exercises a large discretion, although such discretion cannot be exercised arbitrarily. On the other hand, there is authority that on a plea in abatement in a criminal trial in the criminal Court, alleging the accused to be under age exempting him or her from criminal prosecution, an issue of fact is raised, on which the accused is entitled to have jury trial.

In order to justify criminal, instead of delinquency, proceedings, it must appear affirmatively that the person charged is of the age fixed by statute for criminal prosecution. While clear & convincing evidence, or ascertainment with certainty, is required, a serious & substantial doubt arising from the evidence on the question of age should be resolved in favour of the child. On the other hand, on the ground that the presumption & that the Court will not assume

that person indicated is under the statutory age, there is authority that when the issue is raised, the accused has the burden of proof with respect to his or her age.

The child's appearance, while it should be given due consideration in determining his or her age, should not be permitted to outweigh or overcome positive testimony, facts, & circumstances tending to show him or her to be under the given age. The Child's statements or admissions as to his or her age, although admissible on the issue are not controlling as against positive evidence."

10. In view of the above, we do take exception to the observation made by the High Court in this regard. Accordingly, we allow the appeal & remand the matter to the High Court, & request the High Court to consider the application filed by the Appellant claiming that he was a juvenile at the time of the incident in accordance with law & in accordance with the provisions of the Act & the rule framed thereunder as expeditiously as possible.

11. We further clarify that we have not expressed any opinion on the merits or otherwise of the claim of the Appellant in any manner whatsoever.

12. Order accordingly.