SUPREME COURT OF INDIA

Babla Dinesh

Vs.

State of Uttarakhand

Crl.A.No.1349 of 2012

(H.L.Dattu and Chandramauli Kr. Prasad,JJ.)

04.09.2012

JUDGMENT

H. L.Dattu,J.

I. Leave granted.

2. This appeal is directed against the judgment and order passed by the High Court of Uttarakhand at Nainital in Criminal Appeal No.1481 of 2001 dated 21.07.2009. By the impugned judgment, the High Court has confirmed the Order of conviction and sentence of the appellant passed by the Trial Court under Section 302 read with Section 149 of the Indian Penal Code, 1860 (for short 'the IPC').

3. The appellant was one of the accused before the Trial Court for the alleged offences punishable under Section 302 read with Sections 149 and 147 of the IPC. The Trial Court by its judgment and order dated 18.10.1995 in Sessions Trial No. 39 of 1992, convicted and sentenced the appellant for rigorous imprisonment of two years under Section 147 and imprisonment for life under Section 302 read with Section 149 IPC, both sentences to run concurrently. Aggrieved by the order so made, the appellant and others approached the High Court of Uttarakhand at Nainital by way of criminal appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') on various grounds.

4. Before the High Court, apart from others, the learned counsel for appellant raised the contention that the appellant was juvenile on the date of the commission or occurrence of the offence, i.e. on 01.12.1991. The said contention was by the High Court on the ground that it was not raised before the Trial Court and no evidence has been adduced in defence and no suggestion had been made to the witnesses during the trial and that the appellant admitted his age as 20 years at the time of recording his statement under Section 313 of the Cr. P.C.. In conclusion, the Court has observed:

> "Learned counsel for the appellants contended that appellants Gadha and Babla, were minors on the day of the incident. But no such suggestion was made to any of the witnesses nor is any evidence adduced in defence. Rather the accused / appellants Gadha and Babla have disclosed their age 20 years on the day when their statement under Section 313 Cr.P.C. were recorded also makes out the case that their age was more than 16 years on the day of the incident. It is pertinent to mention here that on the day of the incident, and during the trial, Juvenile Justice Act, 1986, was applicable to the cases of Juveniles and not Juvenile Justice (Care and Protection of Children) Act 2000."

5. After issuing notice to the opposite parties in the special leave petition, by our Order dated 18.04.2011, we had directed the learned Sessions Judge or his nominee to conduct an inquiry into the question of the age of the appellant on the date of commission of offence and to submit a report as envisaged under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short 'Rules, 2007).

6. Pursuant to the aforesaid direction, the inquiry report was submitted before this Court, but the same was not accepted, as it was merely based on the opinion of an individual doctor which was not in accordance with the procedure prescribed under Rule 12 of the Rules, 2007. Therefore, by our Order dated 01.11.2011, we had, once again, directed the learned Sessions Judge to conduct an inquiry as prescribed under Rule 12 of the Rules, 2007 and submit his report.

7. Pursuant to the directions issued by us, the learned Additional Sessions Judge has conducted inquiry by following the prescribed procedure under the Rules, 2007 and submitted his inquiry report dated 03.12.2011, wherein, it is concluded that the appellant was aged about 10-15 years on the date of the commission of the offence i.e. 01.12.1991. Therefore, the appellant is juvenile within the meaning of the expression under Section 2(h) of the Juvenile Justice Act, 1986 and Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000.

8. This report is not disputed by the learned counsel for the respondent- State.

9. We have heard the learned counsel for the parties to the lis. We have also carefully perused the judgment and order passed by the High Court. We are of the opinion that the High Court has erred in dismissing the appeal on the ground that no evidence was adduced and no suggestion was made to the witnesses regarding juvenility of the appellant during the trial. In our opinion, the issue of raising the plea for determination of juvenility for the first time at

the appellate stage is no more res integra. This Court *in Lakhan Lal v. State of Bihar,* [1]has allowed such plea raised before this Court for the first time and, taking note of its previous decisions on this point, has observed thus :

> "The fact remains that the issue as to whether the appellants were juvenile did not come up for consideration for whatever reason, before the Courts below. The question is whether the same could be considered by this Court at this stage of the proceedings. A somewhat similar situation had arisen in *Umesh Singh and Anr. v. State of Bihar,* [2]wherein this Court relying upon the earlier decisions in *Bhola Bhagat v. State of Bihar*[3] *Gopinath Ghosh v. State of W.P*[4] and *Bhoop Ram v. State of U.P*[5], while sustaining the conviction of the Appellant therein under all the charges, held that the sentences awarded to them need to be set aside. It was also a case where the appellant therein was aged below 18 years and was a child for the purposes of the Bihar Children Act, 1970 on the date of the occurrence. The relevant paragraph reads as under (Umesh Singh case, SCC, pp.93-94, para [1]6)"

> " So far as Arvind Singh, appellant in Criminal Appeal No. 659 of 1999 is concerned, his case stands on a different footing. On the evidence on record, the learned Counsel for the appellant, was not in a position to point out any infirmity in the conviction recorded by the trial court as affirmed by the appellate court. The only contention put forward before the court is that the appellant is born on 1-1-67 while the date of the incident is 14-15-1980 and on that date he was hardly 13 years old. We called for report of experts being placed before the court as to the age of the appellant, Arvind Singh. The report made to the court clearly indicates that on the date of the incident he may be 13 years old. This fact is also supported by the school certificate as well as matriculation certificate produced before this Court which indicate that his date of birth is 1-1-1967. On this basis, the contention put forward before the court is that although the appellant is aged below 18 years and is a child for the purpose of the Bihar Children Act, 1970 on the date of the occurrence, his trial having been conducted along with other accused who are not children is not in accordance with law. However, this contention had not been raised either before the trail court or before the High Court. In such circumstances this Court in *Bhola Bhagat v. State of Bihar*[6]following the earlier decision in *Gopinath Ghosh v. State of West Bengal*[7]*and Bhoop Ram v. State of U.P*[8] *and Pradeep Kumar v. State of U.P., 1995 Supp* ile sustaining that the sentences awarded to them need to be set aside. In view of the exhaustive discussion of the law on the matter in Bhola Bhagat case, we are obviated of the duty to examine the same but following the same, with respect, we pass similar orders in the present case. Conviction of the appellant Arvind Singh is confirmed but

the sentence imposed upon him stands set aside. He is, therefore, set at liberty, if not required in any other case."

10. We are in respectful agreement with the view expressed by this Court in the aforesaid decision.

11. We have carefully perused the report dated 03.12.2011 of the learned Additional Sessions Judge. Since the report is made after holding due inquiry as required under the Act and the Rules, we accept the same. Accordingly, we hold that the appellant was juvenile, as envisaged under the Act and the Rules framed thereunder, on the date of commission of the offence.

12. The Jail Custody Certificate, produced by the appellant suggests that he has undergone the actual period of sentence of more than three years out of the maximum period prescribed under Section 15 of the Act. In the circumstance, while sustaining the conviction of the appellant for the aforesaid offences, the sentence awarded to him by the Trial Court and confirmed by the High Court is set aside. Accordingly, we direct that the appellant be released forthwith, if not required in any other case. The appeal is partly allowed.

Judgment Referred

[1] *(2011) 2 SCC 0251*
[2] *(2000) 6 SCC 089*
[3] *(1997) 8 SCC 0720*
[4] *(1984)Supp. SCC 0228*
[5] *(1989) 3 SCC 0001*
[6] *1997 (8) SCC 0720*
[7] *1984 Supp. SCC 0228*
[8] *1989 (3) SCC 0001*