
(2019) 04 CHH CK 0004

Chhattisgarh High Court

Case No: Miscellaneous Criminal Case No. 6724, 8523 Of 2016

Tejram Nagrachi
Juvenile And Ors

APPELLANT

Vs

State Of Chhattisgarh
And Ors

RESPONDENT

Date of Decision: April 5, 2019

Acts Referred:

- Constitution Of India, 1950 - Article 15, 39(e), 39(f), 45, 47
- Code Of Criminal Procedure, 1973 - Section 437, 437(3), 438, 439, 446A
- Juvenile Justice (Care And Protection Of The Children) Act, 2000 - Section 6(2), 12
- Juvenile Justice (Care And Protection Of Children) Act, 2015 - Section 2, 8, 8(2), 10, 12, 12(1), 12(2), 12(3), 12(4), 14, 19, 70, 101, 101(2), 102

Hon'ble Judges: Prashant Kumar Mishra, J; Vimla Singh Kapoor, J

Bench: Division Bench

Advocate: Kapil Maini, Shivendu Pandya, Y.S. Thakur, Sunil Otwani

Final Decision: Disposed Of

Judgement

The following Order of the Court was passed by Prashant Kumar Mishra, Acting Chief Justice A,â€

1. These two bail applications under Section 439 of the Code of Criminal Procedure (for short 'the Code') have been placed before us for answering

the reference made by the learned Single Judge while deferring with the view taken by the coordinate Bench in the matters of Mohan Vs. State of

CG {2005 Cri L J 3271 : 2005 SCC OnLine Chh 126} followed in Subhash Kumar @ Sonu Vs. State of Chhattisgarh {MCrC No.5651/2014, order

dated 28.11.2014}. While the view in Mohan and Subhash Kumar @ Sonu was that despite the provisions contained in Section 12 of the Juvenile

Justice (Care and Protection of the Children) Act, 2000, which is pari materia to the Juvenile Justice (Care and Protection of Children) Act, 2015

(henceforth 'the Act of 2015'), the bail application under Section 439 of the Code is maintainable before the Sessions Court and the High Court,

correctness of the view has been doubted by the learned Single Judge and the following question has been referred for decision by a Bench of Two

Judges:Ã,â€‹

Ã¢,–“Whether in view of non obstante clause contained in Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015, provisions

under Section 437 and 439 of Cr.P.C. are applicable for being invoked for grant of bail by a child in conflict with law as defined under the Juvenile

Justice (Care and Protection of Children) Act, 2015.Ã¢,–â€‹

2. In Mohan (Supra), it is held in paraÃ,13 that the Act does not take away the power and jurisdiction of the High Court or Court of Session regarding

bail as provided under Sections 438 and 439 of the Code. Similar view was taken by another coordinate Bench in the matter of Subhash Kumar @

Sonu, referred to above, holding thus at paraÃ,â€‹12:Ã,â€‹

Ã¢,–“12. Thus, taking into consideration the provisions contained in subÃ,section (2) of Section 6 of the Act, 2000, it is quite vivid that power conferred

to the Juvenile Justice Board under the Act, 2000 can also be exercised by the High Court and the Court of Session either in appeal or revision or

otherwise and the word Ã¢,–“otherwiseÃ¢,– also includes proceeding under Section 439 Cr.P.C. Thus, I hold that this bail application under Section 439

of the Cr.P.C., by the juvenile on refusal to grant bail by the Court of Session, is maintainable under law and it is held accordingly.Ã¢,–â€‹

3. Taking contrary view, the learned Single Judge would conclude thus at paraÃ,â€‹18 of the Reference Order:Ã,â€‹

Ã¢,–“18. Analyzed as above, the Juvenile Justice (Care and Protection of Children) Act, 2015 contains provision for grant of bail which is different from

the scheme of grant of bail under Section 437 or 439 of Cr.P.C. as both operate on different considerations, though some of the considerations like

consideration that grant of bail is likely to defeat the ends of justice could be relevant in both the cases. Therefore, it is vividly clear that the two

schemes for grant of bail, one with regard to post arrest bail found under Section 437 & 439 of Cr.P.C. and other found under Section 12 of the Act

of 2015 are inconsistent with each other and there is a great degree of repugnancy between them. While considering application for grant of bail under

Section 439 Cr.P.C., mere gravity of allegations by itself may be ground for rejecting the bail but that considerations may not apply while considering

grant of bail to a juvenile. Similarly, the Juvenile Justice Board shall have to reject the application for grant of bail of juvenile, if there appears to be

reasonable ground for believing that release may expose the juvenile to moral, physical or psychological danger, which may not be relevant while

considering application for grant of bail under Section 437 or 439 of Cr.P.C. Therefore, a comparative reading of the scheme for grant post arrest bail

under general law and the special law reveals that the two schemes are inconsistent with each other. If this kind of conflict, inconsistency or

repugnancy exists, non-obstante clause would operate to exclude the applicability of general provisions relating to bail contained under the Code of

Criminal Procedure to the extent, it is inconsistent with the scheme of grant of post arrest bail under Section 12 of the Act of 2015. It is equally settled

proposition of law that where there is no special provision made in special law and it is silent on a particular aspect, the provisions of general law will

hold field and would be applicable.

4. To answer the reference, it would be necessary to refer to the relevant provisions under the Code and the Act of 2015. Sections 437 and 439 of the

Code are, therefore, reproduced hereunder for ready reference:

437. When bail may be taken in case of non-bailable offence, (1) When any person accused of, or suspected of, the commission of any non-bailable offence

bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than

the High Court or Court of Session, he may be released on bail, but—

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or

imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with

death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable

offence punishable with imprisonment for three years or more but not less than seven years.:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen

years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to

do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient

ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as

may be given by the Court.]

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or

imprisonment for seven years or more, be released on bail by the Court under this sub—section without giving an opportunity of hearing to the public

prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for

believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt the accused

shall, subject to the provisions of section 446A and pending such inquiry, be released on bail] or at the discretion of such officer or Court, on the

execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or

of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to

commit, any such offence, is released on bail under sub-section (1), the Court shall impose the conditions –

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to

dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, in the interests of

justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2), shall record in writing his or its reasons or special

reasons] for so doing.

(5) Any Court which has released a person on bail under sub-section (1) or sub-section (2), may, if it considers it necessary so to do, direct that such

person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days

from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to

the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of

opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in

custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

439. Special powers of High Court or Court of Session regarding bail.

(1) A High Court or Court of Session may direct—

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection

(3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that subsection;

(b) that any condition imposed by a Magistrate when releasing a person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively

by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public

Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to

custody.

5. Similarly, certain provisions contained in Section 2 of the Act of 2015 defining the 'child', 'child in conflict with law' and 'juvenile' are relevant for our

purpose, therefore, they are reproduced hereunder:

“2 (12). “child” means a person who has not completed eighteen years of age;

2(13). “child in conflict with law” means a child who is alleged or found to have committed an offence and who has not completed eighteen years

of age on the date of commission of such offence;

2 (35). “juvenile” means a child below the age of eighteen years;

6. Sections 8, 10 & 12 of the Act, 2015 would also require to be referred, therefore, they are also reproduced hereunder for ready reference:

“8. Powers, functions and responsibilities of the Board.

(1) Notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, the Board

constituted for any district shall have the power to deal exclusively with all the proceedings under this Act, relating to children in conflict with law, in

the area of jurisdiction of such Board.

(2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Children's Court, when the proceedings

come before them under section 19 or in appeal, revision or otherwise.

(3) The functions and responsibilities of the Board shall include

(a) ensuring the informed participation of the child and the parent or guardian, in every step of the process;

(b) ensuring that the child's rights are protected throughout the process of apprehending the child, inquiry, aftercare and rehabilitation;

(c) ensuring availability of legal aid for the child through the legal services institutions;

(d) wherever necessary the Board shall provide an interpreter or translator, having such qualifications, experience, and on payment of such fees as

may be prescribed, to the child if he fails to understand the language used in the proceedings;

(e) directing the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social

investigation into the case and submit a social investigation report within a period of fifteen days from the date of first production before the Board to

ascertain the circumstances in which the alleged offence was committed;

(f) adjudicate and dispose of cases of children in conflict with law in accordance with the process of inquiry specified in section 14;

(g) transferring to the Committee, matters concerning the child alleged to be in conflict with law, stated to be in need of care and protection at any

stage, thereby recognising that a child in conflict with law can also be a child in need of care simultaneously and there is a need for the Committee and

the Board to be both involved;

(h) disposing of the matter and passing a final order that includes an individual care plan for the child's rehabilitation, including follow up by the

Probation Officer or the District Child Protection Unit or a member of a non-governmental organisation, as may be required;

(i) conducting inquiry for declaring fit persons regarding care of children in conflict with law;

(j) conducting at least one inspection visit every month of residential facilities for children in conflict with law and recommend action for improvement

in quality of services to the District Child Protection Unit and the State Government;

(k) order the police for registration of first information report for offences committed against any child in conflict with law, under this Act or any other

law for the time being in force, on a complaint made in this regard;

(l) order the police for registration of first information report for offences committed against any child in need of care and protection, under this Act or

any other law for the time being in force, on a written complaint by a Committee in this regard;

(m) conducting regular inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer of such

a child to the observation home; and

(n) any other function as may be prescribed.

10. Apprehension of child alleged to be in conflict with law.

(1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile

police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of

twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:

Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail.

(2) The State Government shall make rules consistent with this Act,

(i) to provide for persons through whom (including registered voluntary or nongovernmental organisations) any child alleged to be in conflict with law

may be produced before the Board;

(ii) to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case

may be.

12. Bail to a person who is apparently a child alleged to be in conflict with law.

(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the

police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of

1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer

or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into

association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the

ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer in charge of the police station, such

officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under subsection (1) by the Board, it shall make an order sending him to an observation home or a

place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced

before the Board for modification of the conditions of bail.

7. A conjoint analysis of the provisions contained in Sections 437 and 439 of the Code viz a viz Sections 8, 10 and 12 of the Act, 2015 would discern

that while there are certain general guidelines under Sections 437 & 439 of the Code, power in respect of grant of bail to a juvenile is more liberal in

the nature of command under Section 12 (1) that whenever an apparent juvenile alleged to have committed a bailable or non-bailable offence is

detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code or in any other law for

the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit

person. The only rider for not releasing the apparent juvenile is that whenever there appears reasonable grounds for believing that the release is likely

to bring that person (Juvenile) into association with any known criminal or expose the said person to moral, physical or psychological danger or his

release would defeat the ends of justice, the Board shall record the reasons for denying the bail and circumstances that led to such a decision. This

rider as contained in proviso to Section 12 (1) requires the Board to record reasons for denying the bail. It would mean that ordinarily the bail is to be

allowed to a juvenile. The denial being exceptional on certain reasons to be recorded by the Board as provided in the proviso. This special provision is not contained under Section 439 of the Code.

8. In the matters of Mohan and Subhash Kumar @ Sonu (Supra), the coordinate Benches have based their decision over the use of the word

“otherwise” in sub-section (2) of Section 6 of the Juvenile Justice (Care and Protection of Children) Act, 2000, which is pari materia to Section 8

(2) of the Act of 2015. However, the said provision does not deal with the powers of the Board to grant bail which is specifically contained under

Section 12 of the Act, of 2015. While there is no denial of the fact that when the Court of Sessions exercises appellate power under Section 101 (2)

and the High Court exercises revisional power under Section 102 of the Act of 2015, it shall exercise power of the Board provided under Section 8(2),

but this power of the Board would also be available to the Court of Sessions or to the High Court when it proceeds to examine the plea of juvenile for

grant of bail whenever such occasion arises on account of bail application of juvenile being rejected under Section 12 of the Act of 2015. Therefore,

by use of the term “otherwise” in Section 8(2), jurisdiction under Section 439 of the Code would not be attracted which is otherwise excluded by

use of the term “notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in

force”, as occurring in Section 12 (1).

9. It is also to notice that under the statutory scheme of the Act of 2015, a comprehensive provision has been made as to how a child in conflict with

law has to be dealt with when he is apprehended and not released on bail. The said provisions are contained under sub-sections (2), (3) & (4) of

Section 12 of the Act of 2015. Under the said provision, on denial of bail, such person (Juvenile) has to be kept in observation home in the manner

prescribed until he is brought before the Board. It is also provided that when a child in conflict with law is unable to fulfill the conditions of bail within 7

days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.

10. The provisions *pari materia* to this are not available under Section 439 of the Code, therefore, on denial of bail under Section 439 of the Code or

when the bail is allowed but the juvenile is not able to satisfy the conditions of bail, it is not mandated under the Code that such child shall be produced

before the Board for modification of the conditions of bail. In the absence of this provision either in case of denial of bail or even when the bail is

allowed under Section 439 of the Code, but the conditions of bail are not satisfied, the juvenile would be deprived of his statutory right under Section 12

(2), (3) & (4) of the Act of 2015. It is precisely for this reason Section 12 of the Act of 2015 provides for overriding effect due to use of non-*obstante* clause, therefore, the post arrest bail of juvenile in conflict with law is required to be dealt with under the special provision contained in

Section 12 of the Act of 2015 and to the said extent it will exclude operation of Section 437 and/or Section 439 of the Code.

11. While concluding above, we have kept in our mind the statement of objects and reasons for enacting the Act of 2015, which are reproduced

hereunder for ready reference:

“Article 15 of the Constitution, *inter alia*, confers upon the State powers to make special provision for children. Articles 39 (e) and (f), 45 and 47

further makes the State responsible for ensuring that all needs of children are met and their basic human rights are protected.

2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all

appropriate measures in case of a child alleged as, or accused of, violating any penal law, including (a) treatment of the child in a manner consistent

with the promotion of the child's sense of dignity and worth (b) reinforcing the child's respect for the human rights and fundamental freedoms of others

(c) taking into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

3. The Juvenile Justice (Care and Protection of Children) Act was enacted in 2000 to provide for the protection of children. The Act was amended

twice in 2006 and 2011 to address gaps in its implementation and make the law more child-friendly. During the course of the implementation of the

Act, several issues arose such as increasing incidents of abuse of children in institutions, inadequate facilities, quality of care and rehabilitation

measures in Homes, high Pendency of cases, delays in adoption due to faulty and incomplete processing, lack of clarity regarding roles, responsibilities

and accountability of institutions and, inadequate provisions to counter offences against children such as corporal punishment, sale of children for

adoption purposes, etc. have highlighted the need to review the existing law.

4. Further, increasing cases of crimes committed by children in the age group of 16-18 years in recent years makes it evident that the current

provisions and system under the Juvenile Justice (Care and Protection of Children) Act, 2000, are ill equipped to tackle child offenders in this age

group. The data collected by the National Crime Records Bureau establishes that crimes by children in the age group of 16-18 years have increased

especially in certain categories of heinous offences.

5. Numerous changes are required in the existing Juvenile Justice (Care and Protection of Children) Act, 2000 to address the above mentioned issues

and therefore, it is proposed to repeal existing Juvenile Justice (Care and Protection of Children) Act, 2000 and re-enact a comprehensive legislation

inter alia to provide for general principles of care and protection of children, procedures in case of children in need of care and protection and children

in conflict with law, rehabilitation and social re-integration measures for such children, adoption of orphan, abandoned and surrendered children, and

offences committed against children. This legislation would thus ensure proper care, protection, development, treatment and social re-integration of

children in difficult circumstance by adopting a child-friendly approach keeping in view the best interest of the child in mind.

6. The notes on clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives.

12. It is thus significant to note that treatment of the child in a manner consistent with the promotion of the child's sense of dignity and worth coupled

with reinforcing the child's respect for the human rights and fundamental freedoms of others as also the child's age and the desirability of promoting

the child's reintegration and the child's assuming a constructive role in the society are the stated objects and reasons for enacting the Act of 2015,

which includes the special provision for grant of bail under Section 12 of the Act of 2015 which are apparently more beneficial to the child.

13. In *Vaishali Abhimanyu Joshi Vs. Nanasaheb Gopal Joshi* {(2017) 14 SCC 373}, the Supreme Court has held that the purpose for enacting a

provision has to be given full effect.

14. In respect of non obstante clause, the Supreme Court in the matter of *Union of India Vs. G.M. Kokil* {1984 Supp SCC 196} has laid down in

para 11 as below:

“11.....It is well known that a non obstante clause is a legislation device which is usually employed to give overriding effect to certain provisions

over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and

effect of all contrary provisions. Thus the non obstante clause in Section 70, namely, “notwithstanding anything contained in that Act, must mean

notwithstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the

general applicability of the Act.....”

15. Therefore, Section 12 of the Act of 2015 having included 'notwithstanding anything contained in the Code or in any other law for the time being in

force, the provisions as contained in the Code in respect of grant of bail under Sections 437 and 439 of the Code has to be excluded and shall not apply

while considering the juvenile's right to be enlarged on bail for which a specific provision has been made under Section 12 and thereafter the appellate

and revisional powers of the Court of Sessions and the High Court as contained in Sections 101 and 102 of the Act of 2015, as the case may be.

16. To sum up, we hold that grant of bail to a juvenile is required to be dealt with under Section 12 of the Juvenile Justice (Care and Protection of

Children) Act, 2015 and not under Sections 437 or 439 of the Code of Criminal Procedure. Hence, these applications for grant of bail are not

maintainable.

17. In M.Cr.C. No.6724/2016 (Jayant Kumar Sinha Vs. State of Chhattisgarh) there is interim order releasing him on bail. The said applicant being a

juvenile, we are not canceling the bail allowed to him treating the same to have been allowed by the High Court in exercise of powers under Section

102 of the Act of 2015. The interim bail is made absolute.

18. In other bail application viz. MCrC No.8523/2016 (Tejram Nagrachi Vs. State of Chhattisgarh), it is informed that the trial is over, therefore, the

bail application has been rendered infructuous.

19. Thus, while answering the reference in the manner mentioned above, we dispose of both the bail applications.