(2014) 09 AHC CK 0090

Allahabad High Court

Case No: Criminal Appeal No. 5640 of 2011

Rajesh		APPELLANT
	Vs	
State of U.P.		RESPONDENT

Date of Decision: Sept. 9, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Juvenile Justice (Care and Protection of Children) Act, 2000 - Section 15, 16, 19, 20
- Penal Code, 1860 (IPC) - Section 149, 302, 34, 376
- Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(1)(xii), 3(i)(xii)
- Uttar Pradesh Children Act, 1951 - Section 2, 2(4), 27

Citation: (2014) 9 ADJ 366

Hon'ble Judges: Anil Kumar Sharma, J

Bench: Single Bench

Advocate: V.S. Parmar, Ashok Gupta, Ashutoush Upadhyaya and Balbeer Singh, Advocate for the Appellant

Judgement

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Anil Kumar Sharma, J.

Heard Sri V.S. Parmar, learned counsel for the appellant, Sri Zafeer Ahmad, learned AGA for the State and perused the record of the case carefully. Drawing attention of the Court to the report of the District Judge, Hamirpur dated 21.4.2014, learned counsel for the appellant has submitted that since the sole appellant has been declared delinquent juvenile on the date of offence by the Chief Judicial Magistrate, Hamirpur vide order dated 19.4.2014, he does not press the conviction of the appellant recorded by the learned trial Court for the offence punishable under

Section 376 IPC and Section 3(1)(xii) of SC & ST (Prevention of Atrocities) Act and simply challenges the sentence awarded to him by the learned trial Court.

2. On 3.2.2014 plea of the juvenility of the appellant on the date of offence was raised by the learned counsel for the appellant and after hearing, following relevant order was passed by the Court:

"Learned counsel for the appellant has raised the plea that the appellant was minor at the time of the incident. It has been submitted that according to the statement under Section 313 Cr.P.C. recorded before the Court below, the appellant was aged about 32 years on 2.12.2002 since the date of occurrence is alleged to have taken place on 20.3.1994, from which reckoning the date of birth of the appellant would be 17 years, therefore, he was a juvenile at the time of incident and such plea can be raised at any time before the Court. Sentence awarded by the trial Court be considered in the light of the Juvenile Justice Act (Care and Protection of Children Act, 2000).

In the light of the above, District Judge, Hamirpur is directed to hold an enquiry with regard to the plea of juvenility of the appellant-Rajesh in conflict with law in accordance with the Rule 7(A) of the Rules.

Office is directed to remit the photostat copy of the FIR, statement of the appellant recorded under Section 313 Cr. P. C. and the copy of the impugned judgement dated 26.11.2010 to the District Judge, Hamirpur who is directed to submit his report within a period of two months after determining the plea of juvenility, of the accused appellant which has been raised now, after giving opportunity of hearing to both the parties."

3. Earlier the sole appellant was tried and convicted by Sessions Judge, Hamirpur in Special Case No. 102 of 1995 arising out of crime No. 109 of 1994 P.S. Sumerpur, District Hamirpur vide impugned judgment dated 26.11.2010 for the offences punishable under Section 376 IPC and Section 3(i)(xii) of The S.C. & S.T. (Prevention of Atrocities) Act and was sentenced to 10-years'' R.I. And fine of Rs. 5,000/- under Section 376 IPC and four years'' RI and fine of Rs. 5,000/- under Section 3(1)(xii) of S.C. & S.T. Act with default stipulation. Both the sentences were directed to run concurrently.

4. The District Judge, Hamirpur in compliance with the aforesaid order of the Court directed the Chief Judicial Magistrate, Hamirpur to conduct an enquiry and his order dated 19.4.2014 has been forwarded by the District Judge through letter No. 585/1-05-2010 dated 21.4.2014. On perusal of the order of the CJM aforesaid it transpires that in the enquiry he had issued notice to the complainant i.e., who was the victim herself but it was reported that she is no more. Thereafter notice was sent to her father, who had reiterated that the accused had committed rape with his daughter, who was convicted and sentenced by the Court and his appeal is pending in the High Court. He has further stated that the age of the accused on the date of

incident i.e. 20.3.1994 was more than 18 years. However, no documentary evidence was filed by the father of the victim. The learned Magistrate has examined the mother of the accused Smt. Sukuratin AW-1 who is aged about 70-years. She has given the present age of her son (accused-appellant) as 34-35 years. She had categorically stated that the appellant is illiterate nor he ever attended any school. An application was filed on behalf of the appellant before the learned Magistrate stating that the accused is not literate and he can sign only, so he may be examined by the Medical Board. An opportunity was given to the father of the deceased victim to adduce evidence in this regard, but he did not file any evidence. Thereafter following the provisions of Rule 12(3)(a) and (b) of J.J. Rules, 2007 the Chief Medical Officer, Hamirpur was directed to constitute a Medical Board to ascertain the age of the accused-appellant. The Medical Board in its report dated 26.3.2014 after medical examination of the accused-appellant has given his present estimated age as about 33 years. In these circumstances, the learned Magistrate after evaluating the evidence on record has concluded that on the date of offence the accused was less than eighteen years of age and thus he is a delinquent juvenile.

5. No objection or appeal has been filed against the order of the Chief Judicial Magistrate. The order is well reasoned and thus there is no embargo in accepting the same.

6. Learned counsel for the appellant has referred to the case of Daya Ram and others v. State of U.P., 2013 (3) JIC 399 (All), to contend that now the appellant has been held to be juvenile on the date of offence by the competent Court under the directions of the Court, so order of sentence passed by the Court below needs to be set aside and the appellant is liable to be released forthwith. In this case, a Division Bench of this Court after upholding the conviction of the accused-appellant for the offence punishable under Section 302 IPC has directed to transmit the records of the case to the concerned Juvenile Justice Board for passing appropriate sentence in the light of Sections 15 and 16 of the Act and the appellant was directed to be released forthwith. In para-31 of the report, it has been observed as under:

"Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 requires that if the Court has upheld the judgment of conviction , which was passed in respect of the juvenile then it could not pass any order of sentence. The said Act requires that in such a case the whole records of the case shall be transmitted to the concerned Juvenile Justice Board for passing appropriate order of sentence upon such convicted juvenile in the light of Sections 15 and 16 of the said Act."

7. As stated earlier the Chief Judicial Magistrate in his order dated 19.4.2014 has held that the present age of the appellant is about 37 years and on the date of incident i.e. 20.3.1994 he was aged about 17 years. The appellant is in jail since 26.11.2010. As per clause (g) of Sub-section (1) of Section 15 of the Juvenile Justice Act, the maximum period for which the appellant could be sent to a special home is a period of three years. Since the appellant is now aged about 37 years, so there is

no question of sending him to a special home under the Juvenile Justice (Care and Protection of Children) Act, 2000 for detention.

8. In this regard we may usefully follow the law laid down by the Apex Court in the case of Vijay Singh Vs. State of Delhi, , wherein almost in similar situation, the Hon''ble Court after elaborately interpreting the relevant provisions of the Act, has quashed the sentence awarded to a juvenile and refrained from remitting the case to the JJ Board as required under Section 20 of the Act because he was aged more than 30 years and had undergone sentence of more than three years. The Hon''ble Court in para-16 to 22 has held as under :

"16. Having regard to the above conclusion, in the normal course we would have remitted the matter to the Juvenile Justice Court, Itawa for disposal in accordance with law. However, since the offence was alleged to have been committed more than 10 years ago and having regard to the course adopted by this Court in certain other cases in Jayendra and another Vs. State of Uttar Pradesh, , Bhoop Ram Vs. State of U.P., , which were subsequently followed in Bhola Bhagat Vs. State of Bihar, , Pradeep Kumar, Krishan Kant and Jagdish Vs. State of U.P., , Upendra Kumar Vs. State of Bihar, and Vaneet Kumar Gupta @ Dharminder Vs. State of Punjab, , we are of the view that at this stage when the appellant would have now crossed the age of 30 years, there is no point in remitting the matter back to the Juvenile Justice Court. Instead, following the above referred to decisions, appropriate orders can be. passed by this Court itself.

17. In Jayendra (supra) the challenge arose under Uttar Pradesh Children Act, 1951 which contained Section 27 which mandated that no child shall be sentenced to any term of imprisonment and if a child had been found to have committed an offence punishable with imprisonment then he could be sent to an approved school. However, it had been determined by the Supreme Court through the reports of medical officers taking into account the general appearance, physical examination and radiological findings of the appellant Jayendra, that he had been a "child'' under the definition in the Act at the time of commission of the offence. However, at the time of hearing of the SLP by the Supreme Court, he had already attained the age of 23. In the light of that the Court upheld the conviction of the appellant Jayendra, but quashed the sentence imposed on him and directed that he be released forthwith. The Court observed as under :

"3. Section 2(4) of the Uttar Pradesh Children Act, 1951 (U.P. Act 1 of 1952) defines a child to mean a person under the age of 16 years. Taking into account the various circumstances on the record of the case we are of the opinion that the appellant Jayendra was a child within the meaning of this provision on the date of the offence. Section 27 of the aforesaid Act says that notwithstanding anything to the contrary in any law, no Court shall sentence a child to imprisonment for life or to any term of imprisonment. Section 2 provides, insofar as it is material, that if a child is found to have committed an offence punishable with imprisonment, the Court may order him

to be sent to an approved school for such period of stay as will not exceed the attainment by the child of the age of 18 years. In the normal course, we would have directed that the appellant Jayendra should be sent to an approved school but in view of the fact that he is now nearly 23 years of age, we cannot do so.

4. For these reasons, though the conviction of the appellant Jayendra has to be upheld, we quash the sentence imposed upon him and direct that he shall be released forthwith."

18. In Bhoop Ram (supra) also the case arose under the Uttar Pradesh Children Act, 1951. The controversy there was surrounding the question whether the appellant had actually been a juvenile/child under the definition of the Act at the time of commission of the offence. Although such a plea had been taken before both the trial Court as also the Sessions Court, the trial Court had merely taken into account such a plea for the purpose of awarding a reduced sentence of life imprisonment instead of death penalty for the offences he had been charged with and convicted for. When the appeal reached the Supreme Court, this Court directed an enquiry by the Sessions Judge to determine if the appellant had been actually been a child at the time of the incident. The Sessions Judge conducted an enquiry, taking into account the opinion of the Chief Medical Officer and the school certificate that had been produced by the appellant, and concluded that the appellant had not been a "child'' at the concerned time. However, the Supreme Court rejected the finding of the Sessions Judge being based on surmises and essentially relying upon the school certificate produced by the appellant to conclude that he indeed had been a "child'' at the time when the offence had been committed. On the question of sentencing, this Court followed the precedent in Jayendra (supra) and quashed the sentence, observing;

"8. Since the appellant is now aged more than 28 years of age, there is no question of the appellant now being sent to an approved school under the U.P. Children Act for being detained there. In a somewhat similar situation, this Court held in Jayendra v. State of U.P., that where an accused had been wrongly sentenced to imprisonment instead of being treated as a "child" under Section 2(4) of the U.P. Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed insofar as the sentence imposed upon the appellant are quashed."

19. In Bhola Bhagat (supra) this Court had discussed the present issue at hand at quite some length. Three of the appellants had taken the plea of juvenility in assailing the order of the High Court sentencing them to imprisonment for life for

offences under Section 302/ 149, IPC. The Supreme Court agreed with the findings of the lower Courts as regards the involvement of the appellants in the commission of the offence and held that the same had been established beyond reasonable doubt. However, on the question of sentencing, the Court looked into the plea of juvenility as had been claimed by the appellants. The Court had noted the interplay of the two Acts in question viz. The Bihar Children Act, 1982 and the Juvenile Justice Act, 1986 and that the Bihar Act had already been in force at the time of the commission of the offence. It took note of the decisions of this Court in Bhoop Ram (supra) and Jayendra (supra) and emphasized that in these cases although the conviction was sustained the sentence had been quashed taking into account the fact that the appellants had crossed the age of juvenility and could not be sent to an "approved school'' as had been contemplated under the relevant Children''s Act. The Court proceeded to discuss the three Judge Bench decision of this Court in Pradeep Kumar (supra) and quoted the following from that case :

"12.....

"At the time of the occurrence Pradeep Kumar appellant, aged about 15 years, was resident of Railway Colony, Naini, Krishan Kant and Jagdish appellants, aged about 15 years and 14 years, respectively, were residents of Village Chaka, P.S. Naini."

At the time of granting special leave, two appellants therein produced school-leaving certificate and horoscope respectively showing their ages as 15 years and 13 years at the time of the commission of the offence and so far as the third appellant is concerned, this Court asked for his medical examination and on the basis thereof concluded that he was also a child at the relevant time. The Court then held: (SCC p. 420, paras 3 and 4)

"It is, thus, proved to the satisfaction of the Court that on the date of occurrence, the appellants had not completed 16 years of age and as such they should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment on conviction under Sections 302/ 34 of the Act.

Since the appellants are now aged more than 30 years, there is no question of sending them to an approved school under the U.P. Children Act for detention. Accordingly, while sustaining the conviction of the appellants under all the charges framed against them, we quash the sentences awarded to them and direct their release forthwith. The appeals are partly allowed in the above terms."

(Emphasis supplied)

20. The Court in its final conclusion in Bhola Bhagat (supra), adopted the same course as had been done in the aforementioned cases and observed :

"15. The correctness of the estimate of age as given by the trial Court was neither doubted nor questioned by the State either in the High Court or in this Court. The parties have, therefore, accepted the correctness of the estimate of age of the three

appellants as given by the trial Court. Therefore, these three appellants should not be denied the benefit of the provisions of a socially progressive statute. In our considered opinion, since the plea had been raised in the High Court and because the correctness of the estimate of their age has not been assailed, it would be fair to assume that on the date of the offence, each one of the appellants squarely fell within the definition of the expression "child". We are under these circumstances reluctant to ignore and overlook the beneficial provisions of the Acts on the technical ground that there is no other supporting material to support the estimate of ages of the appellants as given by the trial Court, though the correctness of that estimate has not been put in issue before any forum. Following the course adopted in Gopinath Ghosh, Bhoop Ram and Pradeep Kumar cases while sustaining the conviction of the appellants under all the charges we quash the sentences awarded to them.

16. The appellants Chandra Sen Prasad, Mansen Prasad and Bhola Bhagat, shall, therefore, be released from custody forthwith, if not required in any other case. Their appeals succeed to the extent indicated above and are partly allowed."

21. In Upendra Kumar (supra), this Court reiterated the position that has been adopted in the aforementioned cases. The appellant had been handed down a life imprisonment for his conviction under Section 302 of the IPC. He had been a juvenile, as under the Juvenile Justice (Care & Protection of Children) Act, 2000, on the day of the commission of the offence but, however, the protection of the Act had not been afforded to him. Through the report of the Medical Board, it had been fully established that the appellant was between the age of 17 and 18 years on the date of the report which was dated some three months after the day of incident in question. Even the order of sentence recorded the age of the appellant as 17 years. The Court thus concluded that the appellant was liable to be granted the protection of the Juvenile Justice Act, 2000. As regards the course to be adopted as a sequel to such conclusion, this Court referred to the earlier decisions such as in the case of Bhola Bhagat (supra), Bhoop Ram (supra) etc. The Court observed in this regard :

"4. Mr. Sharan has cited various decisions but reference may be made only to the case of Bhola Bhagat v. State of Bihar, since earlier decisions on the issue in question have been noticed therein. In Bhola Bhagat case referring to the decisions in the case of Gopinath Ghosh v. State of W.B., Bhoop Ram v. State of U.P. and Pradeep Kumar v. State of U.P., this Court came to the conclusion that the accused who were juvenile could not be denied the benefit of the provisions of the Act then in force, namely, the Juvenile Justice Act, 1986.

5. The course this Court adopted in Gopinath Ghosh case as also in Bhola Bhagat case was to sustain the conviction but, at the same time, quash the sentence awarded to the convict. In the present case, at this distant time, the question of referring the appellant to the Juvenile Board does not arise. Following the aforesaid decisions, we would sustain the conviction of the appellant for the offences for

which he has been found guilty by the Court of Session, as affirmed by the High Court, at the same time, however, the sentence awarded to the appellant is quashed and the appeal is allowed to this extent. Resultantly, the appellant is directed to be released forthwith if not required in any other case."

22. Similar course of action was taken in a recent decision of this Court in Vaneet Kumar Gupta alias Dharminder (supra). Challenge in that appeal was mainly on the award of sentence of life imprisonment to the appellant and to determine whether adequate material had been available on record to hold that the appellant had not attained the age of 18 years on the date of commission of the offence. Upon an affidavit filed by the Deputy Superintendent of Police pursuant to inquiries made by him, it was reported that the age of the appellant as on the date of occurrence had been about 15 years. The inquiry report inspired confidence of the Court and the Court held that the appellant cannot be denied the benefits of the Juvenile Justice (Care 8s Protection of Children) Act, 2000. As regards the question of sentence, this Court observed :

"12. The inquiry report, which inspires confidence, unquestionably establishes that as on the date of occurrence, the appellant was below the age of eighteen years; was thus, a "juvenile" in terms of the Juvenile Justice Act and cannot be denied the benefit of the provisions of the said Act. Therefore, having been found to have committed the aforementioned offence, for the purpose of sentencing, he has to be dealt with in accordance with the provisions contained in Section 15 thereof. As per clause (g) of sub-section (1) of Section 15 of the Juvenile Justice Act, the maximum period for which the appellant could be sent to a special home is a period of three years.

13. Under the given circumstances, the question is what relief should be granted to the appellant at this juncture. Indisputably, the appellant has been in prison for the last many years and, therefore, at this distant time, it will neither be desirable nor proper to refer him to the Juvenile Justice Board. Accordingly, we follow the course adopted in Bhola Bhagat v. State of Bihar, sustain the conviction of the appellant for the offence for which he has been found guilty by the Sessions Court, as affirmed by the High Court and at the same time quash the sentence awarded to him.

14. Resultantly, the appeal is partly allowed to the extent indicated above. We direct that the appellant shall be released forthwith, if not required in any other case."

9. Similar views were taken by Hon''ble the Supreme Court in the cases of Kalu @ Amit v. State of Haryana, - unreported - (Criminal Appeal No. 1467 of 2007 with Criminal Appeal No. 868 of 2008 Joginder and another v. State of Haryana) decided on August 17, 2012 and Babla @ Dinesh Vs. State of Uttarakhand, . In para-18 of the report of Kalu @ Amit''s case, the Apex Court has held as under:

"18. The instant offence took place on 7.4.1999. As we have already noted Kalu @ Amit was a juvenile on that date. He was convicted by the trial Court on 7.9.2000.

The Juvenile Act came into force on 1.4.2001. The appeal of Kalu @ Amit was decided by the High Court on 11.7.2006. Had the defence of juvenility been raised before the High Court and the fact that Kalu @ Amit was a juvenile at the time of commission of offence had come to light the High Court would have had to record its finding that Kalu @ Amit was guilty, confirm his conviction, set aside the sentence and forward the case to the Board and the Board would have passed any appropriate order permissible under Section 15 of the Juvenile Act (See Hari Ram). As noted above, the Board could have sent Kalu @ Amit to a Special Home for a maximum period of three years and under Section 19, it would have made an order directing that the relevant record of conviction be removed. Since on the date of offence, Kalu @ Amit was about 17 years, 5 months and 23 days of age, he could have been directed to be kept in protective custody for 3 years under proviso to Section 16 as the offence is serious and he was above 16 years of age when the offence was committed. But he certainly could not have been sent to jail. Since, the plea of juvenility was not raised before the High Court, the High Court confirmed the sentence which it could not have done. None of the above courses can be adopted by us, at this stage, because Kalu @ Amit has already undergone more than 9 years of imprisonment. In the peculiar facts and circumstances of the case, therefore, we quash the order of the High Court to the extent it sentences accused Kalu @ Amit to suffer life imprisonment for offence under Section 302 read with Section 34 of the IPC. After receipt of report from Additional Sessions Judge, Rewari, vide order dated 14.12.2009, we had ordered that the Kalu @ Amit be released on bail. If he has availed of the bail order, his bail bond shall stand discharged. If he has not availed of the bail order, the prison authorities are directed to release him forthwith, unless he is required in some other case. Accused Kalu @ Amit shall not incur any disqualification because of this order. Criminal Appeal No. 1467 of 2007 filed by the accused Kalu @ Amit is allowed to the above extent."

10. The operative portion of the judgment of the Apex Court in the case of Babla @ Dinesh (supra) reads as under:

"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."

11. In this case the accused-appellant was found guilty for the offence punishable under Section 302/ 149 IPC. Upholding his conviction, the plea of his juvenility was rejected 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. The Apex Court directed the Sessions Judge to conduct an enquiry about the juvenility of the appellant on the date of offence. In this case also, the Hon''ble Apex Court agreeing with the view taken in Bhola Bhagat Vs. State of Bihar, , following the earlier decision in Gopinath Ghosh Vs. The State of West Bengal, and Bhoop Ram Vs. State of U.P., and Pradeep Kumar, Krishan Kant and Jagdish Vs. State of U.P., , while confirming the conviction of the appellant has set aside the sentence awarded to him.

12. In view of the plethora of case-laws of the Apex Court on the point, I have no hesitation in following the ratio given by the Hon''ble Court in the above noted cases as compared to the Division Bench case of this Court Daya Ram (supra). Thus, the sentence awarded to the appellant is liable to be set aside.

13. The net result of the above discussion is that the appeal is partly allowed. The conviction of the appellant for the offence punishable under Section 376 IPC and Section 3(i)(xii) of S.C. & S.T. (Prevention of Atrocities) Act is confirmed. However, the sentence awarded to him on both counts is set aside. He is in judicial custody. He should be released from jail forthwith, if not wanted in any other case. Let copy of the judgment be sent to the Court concerned immediately for compliance.