

Court No. - 12

Case :- CRIMINAL APPEAL No. - 509 of 1998

Appellant :- Lav Kush

Respondent :- State of U.P.

Counsel for Appellant :- Janaran Prasad, Ajai Kumar Gupta, R P Singh, Sandhya Bharti, Shri Desh Ratan Mishra

Counsel for Respondent :- Govt. Advocate

Hon'ble Saurabh Lavania, J.

1. Heard Shri Desh Ratan Mishra, learned counsel for the appellant, Shri Ajay Kumar Srivastava, learned A.G.A. for the State-respondent and perused the record.
2. The instant appeal under Section 374(2) Cr.P.C. has been filed challenging the order dated 08.09.1998 passed by Sessions Judge, Sitapur (in short "trial court") in Session Trial No. 1219 of 1997 arising out of Case Crime No. 37 of 1994, under Sections 376 IPC, Police Station- Rampur Kalan, District- Sitapur, whereby, the trial court awarded seven years rigorous imprisonment for the offence under Section 376 IPC.
3. The case of the prosecution, in nutshell, is to the effect that on 17.02.1994, the minor/victim 'X', aged about 7 years at the time of incident, was sexually assaulted when she went to ease herself in an agricultural field and due to the same, the victim became unconscious. Thereafter, the FIR (Ex.Ka-1) of this incident was lodged on 18.02.1994 at about 06:15 A.M. by Raja Ram, brother of the victim, at Police Station- Rampur Kalan, District- Sitapur.
4. After completion of investigation in the matter, the Investigation Officer (in short "IO") submitted the charge-sheet (Ex.Ka-6). Upon due consideration of the facts and also the evidence collected by the IO, the charge was framed against the accused-appellant for the offence under Section 376 IPC. The accused-appellant denied the charge framed against him and claimed trial.
5. Thereafter, to establish its case before the trial court, the prosecution produced and examined witnesses of fact namely Raja Ram (P.W.1) and victim (P.W.2), who supported the prosecution case, and also examined other formal witnesses.

6. Dr. Sarita Saxena (P.W.3) proved the medical report (Ext.Ka.-2) and supplementary report (Ext.Ka.-3). Formal witnesses also proved the documentary evidence produced by the prosecution.

7. After completion of evidence of the prosecution, the trial court put question to the accused-appellant in terms of Section 313 Cr.P.C. and in response, the appellant denied the charges and the case of the prosecution. It is stated that the story of the prosecution is completely false and he has been falsely implicated.

8. Thereafter, the trial Court passed the judgment of conviction, under appeal, dated 08.09.1998

9. While impeaching the judgment under appeal, it is stated that the trial court misread the evidence and passed the judgment of the conviction as such the interference is required.

10. Learned counsel for the appellant also stated during pendency of the case, the appellant moved an application under Section 9 of Juvenile Justice (Care and Protection of Children) Act, 2015 (in short "Act of 2015") and upon due consideration of the same, this Court vide order dated 12.07.2019 directed the trial Court to decide the issue of juvenility claimed by the appellant. The order dated 12.07.2019 is extracted hereinunder:-

"Shri Desh Ratan Mishra for the appellant and Ms. Parul Kant for the State.

Heard on the application filed under Section 9 of Juvenile Justice (Care & Protection of Children) Act 2015 claiming juvenility to appellant.

This application has been opposed by the State on the ground that school certificate has been obtained in 2014 and merely on the basis of this document, accused appellant cannot be held to be juvenile. She further submits that in the eventuality of directing any enquiry, State be given full opportunity to put forth its case.

Be that as it may, as juvenility has been claimed by the accused, I feel it appropriate to remand the mater back to the trial court. The trial court is directed to conduct suitable enquiry in this respect, after giving full opportunity to the appellant as well as to the State. The trial court, if so desires, may record the evidence of both the parties and may issue further direction as required under the law. Let this exercise be done within four months from the date of receiving this order and the original documents. Registry is directed to send the entire record to the trial court with the direction that after completion of the enquiry, entire record be sent back to this Court.

List this case on 3.12.2019. "

11. It is also stated that in compliance of order dated 12.07.2019, a report dated 13.12.2019 was submitted by the District and Sessions Judge, Sitapur and according to the same at the time of incident, the appellant was about 15 years old. The report, referred, is on record. The relevant portion of the report dated 13.12.2019 is extracted hereinunder:-

"आवेदक/अपीलार्थी लवकुश के द्वारा अपने प्रार्थना पत्र के समर्थन में जो शैक्षणिक दस्तावेजों की प्रतिलिपियां दाखिल की गयी हैं, उनमें उसकी जन्मतिथि 30.09.1980 व 03.09.1980 दर्शायी गयी है, जिन्हें यदि सही मान लिया जाए तो उसकी आयु घटना के समय लगभग 14 वर्ष थी। इस प्रकार जांच के दौरान पत्रावली पर जो साक्ष्य सामग्री एकत्रित की गयी है, उसके अनुसार घटना की तिथि 17.02.1994 को आवेदक / अपीलार्थी की आयु लगभग 15 वर्ष थी और वह किशोर अपचारी (बालको की देख रेख एवं संरक्षण) अधिनियम 2015 के प्राविधानों के अनुसार विधि का उल्लंघन करने वाला बालक घोषित किया जाता है।"

12. It is further stated that taking note of conclusion drawn on the claim of juvenility, according to which, the accused-appellant at the time of incident was about 15 years old, as also the observations made by the Hon'ble Apex Court in various pronouncements, the benefit of juvenility be provided to the appellant.

13. Shri Ajay Kumar Srivastava, learned A.G.A. for the State-respondent supported the judgment of conviction under appeal and stated that the statement of victim of crime is sufficient to convict an accused. In this case, the victim (P.W.1) has deposed in unimpeachable terms and according to the same, the accused-appellant had committed crime. As such, no interference is required in the matter and the appeal is liable to be dismissed.

14. Considered the submissions advanced by learned counsel for the contesting parties and perused the records.

15. To ascertain as to conviction of the accused-appellant is just and proper, this Court considered the statement(s) of victim including the statement made before the trial court and upon due consideration, this Court finds that the victim has supported the story of the prosecution in examination-in-chief as also in cross-examination. This Court also took note of the statement of Dr. Sarita Saxena (P.W.-3), who proved the medical report (Ext. Ka.-6) and supplementary medical report (Ext. Ka.-3) and from the statement of P.W.-3, it is apparent that based upon the medical opinion, the P.W.-3 deposed before the trial court that injuries on the private part of the victim, aged about 6 years at the time of incident, could be caused by sexual assault and these injuries could be sustained

on 17.02.1994 at about 7.00 P.M. and such injuries could be caused by penetration of penis.

16. Upon due consideration of aforesaid, as also the demeanour of the victim indicated by the trial court in the judgment under appeal, this Court is of the firm view that the conviction of the accused-appellant is justified.

17. For the reasons aforesaid, this Court finds no error in the judgment, under appeal, dated 08.09.1998.

18. However, in the facts and circumstances aforesaid particularly the age of the accused-appellant at the time of occurrence/crime i.e. about 15 years, it would be apt to take note of the observations made by Hon'ble Apex Court in the judgment passed in the case of **Karan Alias Fatiya Vs. State of Madhya Pradesh** reported in (2023) 5 SCC 504, whereby Hon'ble Supreme Court approved the view taken in the judgment(s) passed in the case of **Jitendra Singh Vs. State of U.P.** reported in (2013) 11 SCC 193, **Mahesh Vs. State of Rajasthan** reported in (2021) 18 SCC 582 and **Satya Deo Vs. State of U.P.** reported in (2020) 10 SCC 555 and **Upendra Kumar vs. State of Bihar** reported in (2005) 3 SCC 592 as also the provisions of Juvenile Justice (Care and Protection of Children) Act, 1986, which provides maximum punishment which could be awarded to a juvenile.

19. Relevant portion of the judgment passed in the case of **Mahesh (supra)** is extracted herein-under:-

"2. The accused Appellants who admittedly were juveniles under the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "Act of 2000") on the date of commission of the crime i.e. on 12th May, 2001 were tried in a regular Criminal Court and found guilty of offences punishable Under Sections 323, 324, 325, 427, 455 read with Section 149 of the Indian Penal Code, 1860. Both the accused Appellants were acquitted of the offence punishable Under Section 302 Indian Penal Code. The conviction Under Section 455 Indian Penal Code resulted in a sentence of rigorous imprisonment of three years which is the maximum of the punishments imposed on the accused Appellants. The said conviction and sentences have been affirmed in appeal by the High Court.

3. The plea of juvenility of the accused Appellants was taken before this Court for the first time. Accordingly, notices were issued to the State to respond to the said claim of the accused Appellants. In the reply filed by the State the age of the accused Appellants, as claimed, on the date of occurrence was admitted by the State. The accused - Appellants, therefore, were juveniles on the date of occurrence of the offence(s).

4. In the aforesaid facts, two questions arise for determination in the present appeals before us. The first is with regard to the validity/correctness of the conviction recorded by the learned trial Court and affirmed by the High Court and, secondly, if the conviction to be maintained what should be the appropriate measure of punishment/sentence and whether the same should be imposed by this Court or the matter be remanded to the Juvenile Justice Board in accordance with the provisions of Section 20 of the Act of 2000.

5. The position in law in this regard is somewhat unsettled as has been noticed and dealt with by this Court in *Jitendra Singh alias Babboo Singh and Anr. v. State of Uttar Pradesh* (2013) 11 SCC 193 wherein in paragraphs 24 to 27 four categories of cases have been culled out where apparently different approaches had been adopted by this Court. The net result is summed up in paragraph 28 of the aforesaid report which explains the details of the categorization made in the earlier paragraphs of the said report. Paragraph 28 of the said report, therefore, would require a specific notice and is reproduced below:

"28. The sum and substance of the above discussion is that in one set of cases this Court has found the juvenile guilty of the crime alleged to have been committed by him but he has gone virtually unpunished since this Court quashed the sentence awarded to him. In another set of cases, this Court has taken the view, on the facts of the case that the juvenile is adequately punished for the offence committed by him by serving out some period in detention. In the third set of cases, this Court has remitted the entire case for consideration by the jurisdictional Juvenile Justice Board, both on the innocence or guilt of the juvenile as well as the sentence to be awarded if the juvenile is found guilty. In the fourth set of cases, this Court has examined the case on merits and after having found the juvenile guilty of the offence, remitted the matter to the jurisdictional Juvenile Justice Board on the award of sentence."

6. The validity of the conviction in respect of the incident which occurred almost two decades back, in our considered view, ought to be decided in these appeals and the entire of the proceedings including the punishment/sentence awarded should not be interfered with on the mere ground that the accused Appellants were juveniles on the date of commission of the alleged crime. Judicial approaches must always be realistic and have some relation to the ground realities. We, therefore, adopt one of the possible approaches that has been earlier adopted by this Court in the four categories of cases mentioned above to examine the correctness of the conviction of the accused Appellants under the provisions of the Indian Penal Code, as noticed above.

7. In this regard, having perused the materials on record we find no ground whatsoever to take a view different from what has been recorded by the learned trial Court and affirmed by the High Court. The conviction of the accused Appellants Under Sections 323, 324, 325, 427, 455 read with Section 149 Indian Penal Code accordingly shall stand affirmed.

8. This will bring us to a consideration of the sentence to be awarded. Here again, in the four categories of cases that have been noticed in *Jitendra Singh (supra)* and in several subsequent decisions of this Court in *Abdul Razzaq v. State of Uttar Pradesh* (2015) 15 SCC 637, *Mohd. Feroz Khan alias Feroz v. State of Andhra Pradesh* (2015) 16 SCC 186, *Mumtaz alias Muntyaz v. State of Uttar Pradesh* (2016) 11 SCC 786 and *Mahendra Singh*

v. State of Rajasthan (2016) 16 SCC 312 different approaches have been adopted. In some cases, the question of punishment has been left to be determined by the Juvenile Justice Board in view of the provisions of Section 20 of the Act of 2000. In other cases, the issue of punishment has been dealt with by the Court having regard to the fact that on the date when the Court had considered the issue the juvenile(s) have advanced in age.

9. The present is a case where the accused Appellants though juveniles on the date of commission of the alleged crime are, as on today, middle aged persons. The accused Appellant - Mahesh in Criminal Appeal arising out of Special Leave Petition (Criminal) No. 2934 of 2015 had undergone the custody for a period of nearly one year whereas the accused Appellant - Arjun in Criminal Appeal arising out of Special Leave Petition (Criminal) No. 5370 of 2015 had suffered custody for about eight (08) months. The maximum sentence, as already noted, is three years. Having regard to the long efflux of time we are of the view that it will not be necessary, in the facts of the present cases, to cause a remand of the matter to the Juvenile Justice Board for a decision on the quantum of sentence for the reason even if such a remand is made and the Juvenile Justice Board comes to a decision that in addition to the period of custody suffered by the accused Appellants they need to suffer a further period of custody, such custody can only be in a remand home or a protection home to which places the accused Appellants, because of their age as on today, cannot be sent."

20. Relevant portion of the judgment passed in the case of **Karan Alias Fatiya (supra)** is extracted herein-under:

"33. The above judgments relate to an offence covered by either the Juvenile Justice Act, 1986 or the 2000 Act. We now proceed to briefly discuss the provisions under the 2015. Act. Section 9 of the 2015 Act is already reproduced in the earlier part of this judgment. According to Sub-section (3) of Section 9 of the 2015 Act, the Court which finds that the person who committed the offence was a child on the date of commission of such offence would forward the child to the JJB for passing appropriate orders and sentence, if any, passed by the Court shall be deemed to have no effect. This does not specifically or even impliedly provide that the conviction recorded by any Court with respect to a person who has subsequently after the disposal of the case found to be juvenile or a child, would also lose its effect rather it is only the sentence if any passed by the Court would be deemed to have no effect.

34. There is another reason why a trial conducted and conviction recorded by the Sessions Court would not be held to be vitiated in law even though subsequently the person tried has been held to be a child.

35. The intention of the legislature was to give benefit to a person who is declared to be a child on the date of the offence only with respect to its sentence part. If the conviction was also to be made ineffective then either the jurisdiction of regular Sessions Court would have been completely excluded not only Under Section 9 of the 2015 Act but also Under Section 25 of the 2015 Act, provision would have been made that on a finding being recorded that the person being tried is a child, a pending trial should also be relegated to the JJB and also that such trial would be held to be null and void. Instead, Under Section 25 of the 2015 Act, it is clearly provided that any proceeding pending before any Board or Court on the date of

commencement of the 2015 Act shall be continued in that Board or Court as if this Act had not been enacted.

36. Section 25 is reproduced hereunder:

25. Special provision in respect of pending cases. - Notwithstanding anything contained in this Act, all proceedings in respect of a child alleged or found to be in conflict with law pending before any Board or court on the date of commencement of this Act, shall be continued in that Board or court as if this Act had not been enacted.

37. Having considered the statutory provisions laid down in Section 9 of the 2015 Act and also Section 7A of the 2000 Act which is identical to Section 9 of the 2015 Act, we are of the view that merits of the conviction could be tested and the conviction which was recorded cannot be held to be vitiated in law merely because the inquiry was not conducted by JJB. It is only the question of sentence for which the provisions of the 2015 Act would be attracted and any sentence in excess of what is permissible under the 2015 Act will have to be accordingly amended as per the provisions of the 2015 Act. Otherwise, the Accused who has committed a heinous offence and who did not claim juvenility before the Trial Court would be allowed to go scot-free. This is also not the object and intention provided in the 2015 Act. The object under the 2015 Act dealing with the rights and liberties of the juvenile is only to ensure that if he or she could be brought into the main stream by awarding lesser sentence and also directing for other facilities for welfare of the juvenile in conflict with law during his stay in any of the institutions defined under the 2015 Act.

38. In view of the above discussion and the position in law as laid down by the aforesaid judgments and many others referred to in the above judgments, we approve the view taken by this Court in the case of Jitendra Singh (supra), Mahesh (supra) and Satya Deo (supra).

39. For all the reasons recorded above, it is ordered as follows: The conviction of the Appellant is upheld; however, the sentence is set aside. Further as the Appellant at present would be more than 20 years old, there would be no requirement of sending him to the JJB or any other child care facility or institution. Appellant is in judicial custody. He shall be released forthwith. The impugned judgment shall stand modified to the aforesaid extent."

21. In the judgment passed in the case of **Upendra Kumar (supra)**, the Hon'ble Apex Court observed as under:-

"2. Mr A. Sharan, learned Senior Counsel appearing for the appellant, rightly did not challenge the conviction of the appellant for the offences aforesaid. Learned counsel, however, submits that the appellant is entitled to the benefit of the Juvenile Justice (Care and Protection of Children) Act, 2000 since he was a juvenile both on the date of the occurrence and the date of his production before the court since both the dates in the present case were the same, namely, 10-3-1995. Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "the Act") provides that "juvenile" or "child" means a person who has not completed eighteenth year of age. The fact that on the date in question, the appellant had not completed 18 years of age cannot be doubted as the aspect of age stands fully established on the record. As per the report of the Medical Board, placed as Annexure A to the appeal, the appellant was between the age of 17

and 18 years on the date of the report, namely, 28-6-1995. Even the order of sentence records the age of the appellant as 17 years.

3. Section 16 of the Act, inter alia, provides that no juvenile shall be sentenced to death or life imprisonment, or committed to prison in default of payment of fine or in default of furnishing security. A juvenile, under the provisions of the Act, can be referred to the Juvenile Board for such orders to be passed by the Board as it thinks fit in terms of Section 15 of the Act. Section 20 provides for special provision in respect of pending cases. It provides that notwithstanding anything containing in the Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Act came into force in that area shall be continued in that court as if the Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence. The Act came into force on 1-4-2001. Therefore, when the High Court decided the criminal appeal filed by the appellant, the Act had already been in force and the appellant was entitled to the benefit thereof.

4. Mr Sharan has cited various decisions but reference may be made only to the case of *Bhola Bhagat v. State of Bihar* [(1997) 8 SCC 720 : 1998 SCC (Cri) 125] since earlier decisions on the issue in question have been noticed therein. In *Bhola Bhagat case* [(1997) 8 SCC 720 : 1998 SCC (Cri) 125] referring to the decisions in the case of *Gopinath Ghosh v. State of W.B.* [1984 Supp SCC 228 : 1984 SCC (Cri) 478] , *Bhoop Ram v. State of U.P.* [(1989) 3 SCC 1 : 1989 SCC (Cri) 486] and *Pradeep Kumar v. State of U.P.* [1995 Supp (4) SCC 419 : 1995 SCC (Cri) 395] 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* [1984 Supp SCC 228 : 1984 SCC (Cri) 478] as also in *Bhola Bhagat case* [(1997) 8 SCC 720 : 1998 SCC (Cri) 125] 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. Upon considering the aforesaid including the date of incident i.e. 17.02.1994, the age of the accused-appellant at the time of commission of crime i.e. 15 years, as per the report dated 13.12.2019 submitted by the trial court, and the present age of the appellant i.e. about 45 years (forty five years), the conviction of the appellant is upheld and in view of the present age of the appellant i.e. about 45 years as also efflux of time since the date of occurrence, there would be no requirement of sending the appellant to Juvenile Justice Board or other child care facility or institution and accordingly, the sentence awarded by the trial court is hereby modified to one already undergone and fine of Rs.

5,000/-, which shall be deposited if already not deposited, within a period of one months from today, failing which the same shall be recovered as per law.

23. As the accused-appellant is on bail, his bail bonds are cancelled and sureties are discharged.

24. Office/Registry is directed to send the copy of this judgment for necessary compliance along with trial court record to the court concerned forthwith.

25. The instant appeal is **partly allowed**.

Order Date :- 23.11.2024

Arun/-