Babloo Pasi vs State Of Jharkhand & Anr on 3 October, 2008

Equivalent citations: AIR 2009 SUPREME COURT 314, 2008 AIR SCW 7332, 2009 (2) AIR JHAR R 187, 2009 (1) ALLCRILR 87, 2009 (1) ALLCRIR 383, 2009 (3) SCC(CRI) 266, 2008 (13) SCC 133, (2008) 2 CRILR(RAJ) 845, 2008 (4) DLT(CRL) 567, (2008) 4 JCC 2746 (SC), 2008 (13) SCALE 137, 2008 (4) JCC 2746, (2009) 2 EASTCRIC 96, 2008 CRILR(SC MAH GUJ) 845, (2009) 1 JCR 73 (SC), (2008) 3 MAD LJ(CRI) 1475, 2009 CHANDLR(CIV&CRI) 5, 2008 CRILR(SC&MP) 845, (2009) 1 GUJ LH 331, (2008) 41 OCR 890, (2008) 4 CURCRIR 444, (2009) 64 ALLCRIC 754, (2009) 1 CHANDCRIC 170, 2008 (2) ALD(CRL) 907

Author: D.K. Jain

Bench: D.K. Jain, C.K. Thakker

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1572 2008
(Arising out of S.L.P. (Criminal) No.1620 of 2007)

BABLOO PASI -- APPELLANT

VERSUS

STATE OF JHARKHAND & ANR. -- RESPONDENTS

J U D G M E N T

D.K. JAIN, J.:

Leave granted.

2. This appeal, by special leave, is directed against the judgment and order dated 21st December,

2006 rendered by the High Court of Jharkhand at Ranchi in Criminal Revision No. 836 of 2006. By the impugned order, the High Court has allowed the revision petition preferred by the accused under Section 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short `the Act') against the order passed by the Juvenile Justice Board, Dumka (hereinafter referred to as `the Board'). The learned Single Judge has held that on the date of commission of the alleged offences, the accused was a "juvenile" within the meaning of the Act.

3. Rajesh Mahatha, the accused and respondent No.2 in this appeal, was apprehended for having committed offences under Sections 304B and 306 of the Indian Penal Code, 1860 (for short `I.P.C.'), in relation to the death of his wife, on the basis of the statement made to the police by the brother of the deceased, the appellant herein. It appears that when the accused was produced before the Chief Judicial Magistrate, Deoghar, he claimed himself to be a "juvenile" as having not attained the age of eighteen years and, therefore, entitled to the protection and privileges under the Act. Accordingly, he was sent to the Child Rehabilitation Centre, Dumka. Since the claim of the accused was disputed on behalf of the prosecution, on 8th February, 2006, the Chief Judicial Magistrate directed the accused to produce evidence/certificate in support of his claim, which he failed to do. It seems that without recording any opinion whether the accused was a Juvenile or not, the Magistrate referred him to the Board. Since the accused failed to produce any evidence regarding his age, the Board referred him to a Medical Board for examination and determination of his age. Taking into consideration, the documentary evidence adduced by the prosecution and observing his physical built up, the Board concluded that the accused was above eighteen years of age on the date of occurrence; was not a juvenile and, therefore, was not required to be dealt with under the Act. Accordingly, the Child Rehabilitation Centre, Dumka was directed to transfer the accused to the regular jail with a direction to its Superintendent to produce the accused before the Court of Chief Judicial Magistrate. The order passed by the Board was challenged by the accused in the High Court. The High Court was of the view that the Board had ignored the opinion of the Medical Board obtained in terms of Rule 22(5)(iv) of the Jharkhand Juvenile Justice (Care and Protection of Children) Rules, 2003 (for short `the Rules'), wherein the age of the accused was shown as 17-18 years. Thus, exercising its revisional jurisdiction, the High Court allowed the revision petition; quashed the order of the Board and held that at the relevant time the accused was a juvenile. The brother of the victim has preferred this appeal by special leave.

4. We have heard learned counsel for the parties.

5. Learned counsel appearing for the appellant submitted that the order of the High Court having been passed without notice to the appellant, who was admittedly a party in the revision petition, is violative of the principles of natural justice as also the statutory provisions, is illegal and deserves to be set aside on this short ground alone. In support of the proposition that an adverse order cannot be passed without hearing the party concerned, reliance was placed on a decision of this Court in P. Sundarrajan & Ors. Vs. R. Vidhya Sekar1. On merits, it was contended that the High Court has failed to consider in its correct perspective the scope of Rule 22 (5). According to the learned counsel, the medical opinion obtained under the said rule is only a guiding factor and not the sole criterion for determination of age and, therefore, before returning any finding on the age of the accused, the High Court could not ignore other (2004) 13 SCC 472 relevant factors and the evidence on record. It was

also pleaded that the scope of the revisional jurisdiction being limited, without pointing out any material irregularity committed by the Board, the High court erred in interfering with a well reasoned order passed by the Board, more so when the accused chose not to avail of remedy available to him by way of an appeal under Section 52 of the Act, whereunder the jurisdiction of the High Court is much wider. In support of the contention that the powers of the revisional court are limited and should be exercised sparingly and cautiously, reliance was placed on the decisions of this court in Krishnan & Anr. Vs. Krishnaveni & Anr.2, State of Maharashtra & Anr. Vs. Jagmohan Singh Kuldip Singh Anand & Ors.3. Reference was also made to State of A.P. Vs. M. Poshetty4, wherein this Court had adversely commented on High Court's interference with the concurrent findings of fact, entered by the trial court, in exercise of revisional powers, without recording any reasons. It was, thus, argued that the High Court exceeded its powers of revisionary jurisdiction.

(1997) 4 SCC 241 (2004) 7 SCC 659 (2001) 10 SCC 629

6.Learned counsel appearing on behalf of the accused while strenuously supporting the order passed by the High Court submitted that since the entire relevant material was available on record, there was no necessity for the High Court to issue notice to the appellant/complainant.

7. Having bestowed our anxious consideration to the material on record, in our judgment, the order of the High Court as also by the Board are unsustainable in law as well as on facts.

8. Section 52 of the Act provides that any person aggrieved by an order made by a competent authority under the Act may prefer an appeal to the Court of Sessions. Section 53 of the Act confers on the High Court the revisional jurisdiction to satisfy itself as to the legality or propriety of any order passed by the competent authority or Court of Sessions. The Section reads as under:

> "53.Revision.- The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:
>
> Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

9. From a bare reading of proviso to the Section, it is plain that in exercise of its revisional jurisdiction the High Court cannot pass an order, prejudicial to any person without affording him a reasonable opportunity of being heard. At this juncture, it would be profitable to note that Section 54 of the Act also prescribes the procedure to be followed while dealing with inquiries, appeals and revisions under the Act. Sub-section (2) thereof stipulates that save as otherwise expressly provided under the Act, the procedure to be followed in hearing revisions under the Act, shall be as far as practicable in accordance with the provisions of the Code of Criminal Procedure, 1973 (for short `the Code'). Sub- section (2) of Section 401 of the Code contemplates that no order under the said Section shall be made to the prejudice of the accused or other person unless he has had an

opportunity of being heard either personally or by pleader in his own defence.

10.Furthermore, by now it is well settled that save in certain exceptional situations, the principle of audi alteram partem mandates that no one shall be condemned unheard. It is a part of rules of natural justice and the soul of natural justice is `fair play in action', which demands that before any prejudicial or adverse order is passed or action is taken against a person, he must be given an opportunity to be heard.

11.The question for consideration is that when the statutory provisions mandate and principles of natural justice demand a pre-decisional hearing, whether or not the High Court was justified in not granting an opportunity of hearing to the appellant/complainant? In our opinion, having regard to the nature of controversy before the High Court and the scheme of the relevant statutory provisions whereunder the High Court was exercising its jurisdiction, the `fairness in action' did demand that the Complainant was given an opportunity of hearing in the Revision petition preferred by the accused. Moreover, he was impleaded as a party respondent and was obviously prejudiced by the order passed by the High Court when the accused was declared to be a juvenile. We have, therefore, no hesitation in holding that the High Court was clearly in error in reversing the order passed by the Board without giving an opportunity of hearing to the appellant. Accordingly, we uphold the contention of learned counsel for the appellant that the order of the High Court deserves to be set aside on this short question alone.

12.We may now take up the pivotal point, viz., whether or not the Board had applied the correct parameters for determining the age of the accused, who is claiming to be a juvenile on the date of occurrence. Determination of age of a delinquent, particularly in borderline cases, is rather a complex exercise. The Act as such does not lay down any fixed norms, which could be applied for determining the age of a person. Sub- Section (1) of the Act provides for presumption and determination of age and reads thus:

> "49. Presumption and determination of age.-(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.
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> (2) xxx xxx xxx"

13.From a bare reading of the provision, it is clear that it merely provides that when it appears to the competent authority viz., the Board, that the person brought before it is a juvenile, The Board is obliged to make an enquiry as to the age of that person; for that purpose it shall take evidence as may be necessary and then record a finding whether the person in question is a juvenile or not. Explaining the scope and purpose of Section 32 of the Juvenile Justice Act, 1986 which is almost pari materia with Section 49 of the Act in Bhola Bhagat Vs. State of Bihar5, this Court had observed

as under:-

> ".....when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially- oriented legislation, it is an obligation of the court where such a plea is raised to (1997) 8 SCC 720 examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other."

14. Nevertheless, in Jitendra Ram alias Jitu Vs. State of Jharkhand6, the Court sounded a note of caution that the aforestated observations in Bhola Bhagat (supra) would not mean that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit and each case has to be considered on the basis of the materials brought on record.

15.At this juncture, it is relevant to note that in exercise of power conferred by Section 68 of the Act, the State Government of Jharkhand has framed the Jharkhand Juvenile Justice (Care and Protection of Children) Rules, 2003. Rule 22 thereof lays down the procedure to be followed by a Board in holding enquiries and the determination of age. Sub-Rule (5) of the said Rule which is material for the present case reads thus:-

> (2006) 9 SCC 428 "22. Procedure to be followed by a Board in holding inquiries and the determination of age.- (1) .....

(5) In every case concerning a juvenile or a child, the Board shall either obtain.-

(i) a birth certificate given by a corporation or a municipal authority; or

(ii) a date of birth certificate from the school first attended; or

(iii)matriculation or equivalent certificates, if available; and

(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, (regarding his age and, when passing orders in such case shall, after taking into consideration such evidence as may be available or the medical opinion, as the case may be record a finding in respect of his age)."

16.Thus, as per Rule 22, in the absence of birth or matriculation certificates, in order to record a finding in respect of age of a person, the Board is required to obtain the opinion of a duly constituted Medical Board. It is clear from a bare reading of the Rule that although the Board is bound to obtain the opinion of the Medical Board but the opinion per se is not a conclusive proof of age of the person concerned. It is no more than an opinion. More so, when even the Medico-Legal opinion is that owing to the variation in climatic, dietic, hereditary and other factors, affecting the people of different States in the country, it would be imprudent to formulate a uniform standard for the determination of the age. True, that a Medical Board's opinion based on the radiological examination is a useful guiding factor for determining the age of a person but is not incontrovertible. Commenting on the evidentiary value of the opinion of a doctor, based on x-ray tests, as to the age of a person, in Ramdeo Chauhan alias Raj Nath Vs. State of Assam7, R.P. Sethi, J., speaking for the majority in a three-Judge Bench, had observed that:-

> "....An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon textbooks, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform."

(2001) 5 SCC 714

17.It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.

18.It is true that in Arnit Das Vs. State of Bihar8, this Court has, on a review of judicial opinion, observed that while dealing with a question of determination of age of an accused, for the purpose of finding out whether he is a juvenile or not, a hyper- technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the Court should lean in favour of holding the accused to be a juvenile in borderline cases. We are also not oblivious of the fact that being a welfare legislation, the Courts should be zealous to see that a juvenile derives full benefits of the provisions of the Act but (2000) 5 SCC 488 at the same time it is also imperative for the courts to ensure that the protection and privileges under the Act are not misused by unscrupulous persons to escape punishments for having committed serious offences.

19.Bearing in mind these broad principles, we may now advert to the facts at hand. Indubitably, neither a date of birth certificate nor a matriculation or equivalent certificate from a school was produced before the Board and, therefore, the Board was required to obtain a medical opinion of a duly constituted Medical Board, which was done. The Medical Board carried out the ossification

tests of the accused and opined that his age was between 17-18 years. Therefore, with a margin of one year, as stipulated in Rule 22(5)(iv), his age could also be 16 years or 19 years. In addition to the said opinion, the prosecution also placed before the Board, a Voters List of the Constituency of Deoghar for the year 2005. In that list, the name of the accused appeared at Sl. No. 317 and his age was recorded as 20 years. Taking into consideration this material and the physical appearance of the accused, the Board opined as under:-

> "Applicant Rajesh Mahatha is present before the Juvenile Justice Board. By observing his physical built up, it appears that he is an adult. Also in the medical examination report his age has been shown as 17-18 years. His adulthood can be verified from the Voter List 2005 where the applicant age has been shown as 20 years. It is also the opinion of the other Board members that the applicant Rajesh Mahatha appears to be adult and in the background of the date of the incident he was an adult.
>
> Therefore, by the concurring opinion of the members of the Board, it is declared that Rajesh Mahatha the accused applicant is an "adult" of more than 18 years of age in the background of the date of the occurrence of the incident."

20.As noted supra, the High Court has reversed the opinion of the Board. The relevant portion of the High Court's order reads thus:-

> "Having regard to the facts and circumstances of the case, I find that Jharkhand Juvenile Justice (Care and Protection of Children) Rules 2003 has devised Rule 22 being the procedure to be followed by the Juvenile Justice Board in holding enquiry in determination of the age of a Juvenile Rule 22 (5) (iv) provides that the opinion of the Medical Board, duly constituted, would be the guiding factor in determination of the age of a Juvenile, subject to margin of one year in absence of the birth certificate of Juvenile in conflict with law. I find that the said provision of Rule has been ignored by the Juvenile Justice Board as well as by the Session Court.

In the circumstance, the order impugned passed by the Juvenile Justice Board on 3.6.2006 whereby and whereunder the age of the petitioner was determined more than 18 years is set aside and the 1st Addl. Sessions Judge, Deoghar is directed to pass appropriate order returning back the records of the Juvenile to the Juvenile Justice Board in accordance with law as early as possible."

21.From the afore-extracted orders of the Board as well as the High Court, it is manifest that the question of determination of age of the accused has been decided by both the Courts in a casual manner, ignoring the principles of law on the subject.

22.Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872. Section 35 of the said Act lays down that an entry in any public or other official book, register, record, stating a fact in issue or relevant fact made by a public

servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. (See: Birad Mal Singhvi Vs. Anand Purohit9)

23.Therefore, on facts at hand, in the absence of evidence to show on what material the entry in the Voters List in the name of the accused was made, a mere production of a copy of the Voters List, though a public document, in terms of Section 35, was not sufficient to prove the age of the accused. Similarly, though a reference to the report of the Medical Board, showing the age of the accused as 17-18 years, has been made but there is no indication in the order whether 1988 (Supp) SCC 604 the Board had summoned any of the members of the Medical Board and recorded their statement. It also appears that the physical appearance of the accused, has weighed with the Board in coming to the afore-noted conclusion, which again may not be a decisive factor to determine the age of a delinquent. Insofar as the High Court is concerned, there is no indication in its order as to in what manner Rule 22(5)(iv) has been ignored by the Board. The learned Judge seems also to have accepted the opinion of the Medical Board in terms of the said Rule as conclusive. Therefore, the afore- stated ground on which the High Court has set aside the opinion of the Board and holding the accused to be a juvenile, cannot be sustained.

24.In our judgment, apart from the fact that the impugned order suffers from the basic infirmity of being violative of the principles of natural justice, it cannot be sustained on merits as well. At the same time, we are also convinced that the order of the Board falls short of a proper enquiry as envisaged in Section 49 of the Act.

25.For the aforementioned reasons, the appeal is allowed and the matter is remitted to the Chief Judicial Magistrate, Deoghar, heading the Board, with a direction to re-determine the age of the accused, as on the date of commission of the alleged offences, in accordance with law, enunciated above. In the event he is found to be a juvenile within the meaning of the Act, he shall be dealt with accordingly. However, if he is not found to be a juvenile, he would face trial under the ordinary criminal law. The inquiry shall be completed expeditiously, preferably within six months of receipt of a copy of this judgment.

.....J. (C.K. THAKKER) .....J. (D.K. JAIN) NEW DELHI;

OCTOBER 3, 2008.