Mumtaz @ Muntyaz vs State Of U.P.(Now Uttarkhand) on 1 July, 2016

Equivalent citations: AIR 2016 SUPREME COURT 3151, 2016 (11) SCC 786, (2016) 4 MAD LJ(CRI) 414, (2016) 3 CURCRIR 191, (2016) 2 ALLCRIR 2221, 2016 CALCRILR 3 592, (2016) 164 ALLINDCAS 121 (SC), 2016 CRILR(SC&MP) 726, (2016) 3 DLT(CRL) 383, (2016) 64 OCR 1006, (2016) 3 CRILR(RAJ) 726, (2016) 3 BOMCR(CRI) 363, (2016) 2 UC 1305, 2016 CRILR(SC MAH GUJ) 726, (2016) 3 PAT LJR 297, (2016) 3 RECCRIR 552, (2016) 3 JLJR 188, (2016) 2 ALD(CRL) 399, (2016) 3 ALLCRILR 796, (2016) 96 ALLCRIC 492, (2016) 6 SCALE 130, 2017 (1) SCC (CRI) 610

Author: Uday U. Lalit

Bench: V. Gopala Gowda, Uday Umesh Lalit

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2084 OF 2009

Mumtaz@ Muntyaz ….Appellant

Versus

State of U.P. (Now Uttarakhand) …. Respondent

WITH
CRIMINAL APPEAL NO.460 OF 2010

Dilshad @ Pappu ….Appellant

Versus

State of U.P. (Now Uttarakhand) …. Respondent

J U D G M E N T

Uday U. Lalit, J.

These appeals by special leave at the instance of Appellants Mumtaz alias Muntyaz and Dilshad alias

Pappu challenge correctness of the decision of the High Court of Uttarakhand at Nainital in Criminal Appeal No.270 of 2001 affirming their conviction and sentence for offences punishable under Section 302 read with Section 34 of the Indian Penal Code (for short the "IPC") passed in Sessions Trial No.15 of 1991 on the file of the Additional Sessions Judge, Roorkee.

2. On 27.12.1990 at about 6.30 AM PW-1 Radhey Shyam lodged FIR Ext.A-1 with Police Station Manglaur that his nephew Pawan Kumar had left his house at about 8.00 PM on the previous day and that in the intervening night of 26th and 27th December 1990 PW-1 heard shrieks of Pawan Kumar from the house of one Raees in the neighbourhood, whereafter PW-1 along with his other nephew PW-2 Anil Kumar came out of the house and saw that the hands of Pawan Kumar were tied and he was ablaze in the courtyard of the house of Raees. Both PWs 1 and 2 rushed there and put a quilt on Pawan Kumar. In this report, PW-1 Radhey Shyam further stated that he had seen the appellants and their associates Naseem Khan and Anees Khan setting Pawan Kumar on fire. Soon after this reporting, the police came to the spot and sent Pawan Kumar to Primary Health Centre, Manglaur for medical attention. Aforesaid FIR Ext.A-1 led to registration of Crime No.328 of 1990 at Police Station Manglaur relating to offences punishable under Sections 307 and 342 IPC.

3. At Primary Health Centre, a dying declaration Ext.A-24 of Pawan Kumar was recorded at 7.35 AM by PW-5 Satya Prakash Mishra, Sub-Divisional Magistrate in which Pawan Kumar stated that the appellants had set him on fire. The translation of the relevant portion of the dying declaration Ext.A-24 is as under:

> "Two persons after pouring kerosene set me on fire. I was set on fire this morning at about 2.00 – 2.30 AM. I was set on fire by Pappu, son of unknown, R/o Landhaura and Mumtaz, son of unknown, R/o Landhaura. Mumtaz works in the flour mill of Pappu. When I was coming after running a VCR on the way, I was taken to house of a Pathani lady whose name is Joulie. Joulie is wife of Raees, R/o Landhaura. In the presence of Joulie, Pappu and Mumtaz poured kerosene on me and set me on fire and ran away. When I started burning, I shouted and a person who is not known to me came there and extinguished fire by pouring water. Thereafter what happened I do not know. I do not know why Pappu and Mumtaz set me on fire. Pappu's flour mill is on Lakshar Road. Name of brother of Pappu is Zinda Hasan." Below the above dying declaration Ext.A-24, a certificate to the effect that Pawan Kumar was in a fit state of mind to give the dying declaration was recorded by Dr. S.K. Mittal.

4. On 27.12.1990 itself PW-2 Anil Kumar who had burnt his hands while trying to save Pawan Kumar, was examined by PW-7 Dr. N.D. Arora, who prepared injury report Ext.A-23. This report mentioned that when he came to the Primary Health Centre, there were burn injuries on the hands of PW-2 Anil Kumar.

5. On 27.12.1990 at about 4.30 PM Pawan Kumar succumbed to burn injuries while he was being taken to Meerut for medical treatment. Crime No.328 of 1990 was thereafter converted to one under Section 302 IPC. After the death of Pawan Kumar, PW-6 Sub-Inspector Saudan Singh, Investigating Officer took the dead body in his possession at about 5.30 PM on 27.12.1990 and prepared inquest

report Ext.A-9. Thereafter by letter Ext.A-8 he sent the body for post-mortem. PW-6 Investigating Officer had interrogated the witnesses and had also taken in possession quilt, match box, shawl and kerosene from the spot vide Memorandum Ext.A-12, A-13, A-14 and A-16.

6. PW-4 Dr. Rakesh Kumar conducted post-mortem on the dead body of Pawan Kumar at about 12.30 PM on 28.12.1990 and found ante-mortem injuries on the body and opined that the deceased had died due to shock from burn injuries.

7. After completion of investigation, charge-sheet Ext.A-16 was filed against the appellants as well as Naseem Khan and Anees Khan. The prosecution examined 9 witnesses. PW-1 Radhey Shyam and PW-2 Anil Kumar were examined as eye witnesses and so also PW-3 Narendra Kumar who had seen the accused taking Pawan Kumar and setting him on fire. PW-4 Dr. Rakesh Kumar who had conducted post mortem on the dead body of deceased Pawan Kumar proved this post mortem report Ext.A-2. According to him, the cause of the death was shock from burn injuries. PW-5 Satya Prakash Mishra proved dying declaration Ext.A-4. The Investigating Officer Saudan Singh was examined as PW-6 who proved Site Plans Ext.A-4 and A-5, sample seal memo Ext.A-7, Inquest Report Ext. A-9, Seizure Memo of quilt Ext. A-10, Seizure Memo of burnt clothes of Pawan Ext.A-11, Seizure Memo of burnt shawl Ext.A-14 and other relevant documents. PW-7 Dr. N. D. Arora was examined to prove injuries on the person of PW-2 Anil Kumar and injury report Ext. A-23. PW-8 Dr. R. D. Sharma proved the endorsement of Dr. S.K. Mittal on the dying declaration of Pawan Kumar Ext.A-22. No witness was examined on behalf of the defence.

8. The Trial Court by its judgment and order dated 19.12.1994 found the appellants guilty of the charges punishable under Section 302 read with Section 34 IPC and sentenced them to imprisonment for life and also directed them to pay fine of Rs.5,000/-, in default whereof they were directed to undergo further imprisonment for one year. Naseem Khan and Anees Khan were however acquitted of all the charges.

9. Aggrieved by the aforesaid conviction and sentence, the appellants preferred Criminal Appeal No.2007 of 1994 in the High Court of Judicature at Allahabad. The appeal was thereafter transferred to the High Court of Uttarakhand at Nainital and re-numbered as Criminal Appeal No.270 of 2001. The High Court by its judgment and order under appeal affirmed the conviction and sentence passed against the appellants. The High Court principally relied upon eye-witness account through PW-1 Radhey Shyam and PW-2 Anil Kumar as well as dying-declaration Ext.A-24.

10. After granting special leave to appeal, by orders dated 15.11.2010 and 03.01.2011 appellant Mumtaz @ Muntyaz and appellant Dilshad @ Pappu respectively were ordered to be released on bail during pendency of these appeals. Thereafter, on an application preferred by Dilshad @ Pappu seeking permission to take additional documents on record to submit that he was a juvenile on the date of the incident, following order was passed by this Court on 07.08.2014.

“Application seeking permission documents on record is allowed. It is submitted by Mr. K.T.S. Tulsi, learned senior counsel that the appellant Dilshad @ Pappu was a juvenile on the date of occurrence i.e. 27.12.1990 inasmuch as his date of birth is 22.07.1974, as is reflected from the School leaving

Certificate, contained in Annexure A-1 at page 9. Learned senior counsel would submit that an inquiry should be held by the District and Sessions Judge, Roorkee, and the report be made available to this Court and thereafter the hearing may take place.

Regard being had to the language employed in Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000, it is directed that the concerned District & Sessions Judge, Roorkee shall cause an inquiry with regard to juvenility of the appellant, Dilshad @ Pappu, after following the procedure as engrafted under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and submit his report within a period of 30 days from the date of receipt of the order passed today. Learned District & Sessions Judge shall submit the documents forming the basis of his report."

11. An appropriate enquiry was thereafter conducted by the First Additional and District Sessions Judge, Roorkee, Haridwar who by his report dated 05.09.2014 concluded as under:-

> "13. Hence from the above discussion the date of birth of Dilshad @ Pappu is discernible from Exhibits Ka4 to Ka5. The entries made therein have not been controverted by the Counsel appearing for the State and there is nothing on record to refute or rebut the factum of date of birth as entered in above Exhibits. Hence the inquiry under Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007 has been fully satisfied. The Court accordingly determines that Dilshad @ Pappu date of birth is 22-7- 1974 (Twenty two July Nineteen Seventy Four) and on date of occurrence i.e. 27-12-1990 he was 16 years 5 months and 5 days old and hence a juvenile as per Juvenile Justice (Care and Protection of Children) Act, 2000.
>
> 14. Let a certified copy of the findings of this Court be forwarded to the Hon'ble Supreme Court of Indian in compliance of its order."

12. On 14.01.2015 when the matters were taken up, the counsel appearing for the State submitted that the decision of this Court in Jitendra Singh and another v. State of U.P.[1] which was relied upon by the counsel for the appellants required re-consideration. On and with effect from 15.01.2016, the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "the 2015 Act") came into force which repealed the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "the 2000 Act").

13. The matters were thereafter taken up for hearing. We heard Mr. K.T.S. Tulsi, learned Senior Advocate in support of these appeals and Mr. Tanmaya Agarwal, learned Advocate for the State. In so far as the appeal of Mumtaz @ Muntyaz is concerned the submissions of the learned Senior Advocate as detailed in his Written Submissions were as under:-

> "1. There are several discrepancies, inconsistencies and contradictions that raise a serious doubt about the reliability of the dying declaration. When all the attendant circumstances are taken together, the cumulative effect is that the dying declaration fails the test of credibility.

> 2. The prosecution case and the dying declaration itself furnishes the defense of grave provocation as a result of which every normal human being will be deprived of the power of self-control. The fact that the deceased is found at the house of appellant's brother at 03:00 am with whose wife he was suspected to be having an illicit liaison it establishes grave provocation. The case would fall within the exception 4 of Section 300 of IPC making him liable for sentence only under Section 304 part-II of IPC."

14. We have gone through dying declaration Ext.A-24 and the examination of PW-5 Satya Prakash Mishra. The witness clearly stated that all through the recording of his statement, Pawan Kumar remained in fit condition and that the witness had got this fact confirmed from the Doctor on duty. The dying declaration bears appropriate endorsement of the Doctor on duty namely Dr. S.K. Mittal which endorsement was proved by PW-8 Dr. R. D. Sharma. There is nothing in the cross examination of either PW-5 or PW-8 nor in the dying declaration Ext.A-24 which could raise any doubt. Relying on the law laid down by this Court in Laxman v. State of Maharashtra[2], we find the evidence in that behalf trustworthy and hold dying declaration Ext. A-24 to be reliable. We, therefore, reject the first submission advanced by the learned Senior Advocate for the appellant Mumtaz @ Muntyaz.

15. The second submission advanced by the learned Senior Advocate is based on the theory or defence of alleged grave provocation. It is true that deceased Pawan Kumar was found at 3:00 a.m. in the house of the brother of appellant Mumtaz @ Muntyaz. The eye witness account shows that his hands were tied and he was set ablaze. The memorandum of the seizure of burnt shawl clearly corroborates said assertion. Therefore, mere presence of Pawan Kumar in the house of the brother of appellant Mumtaz alia Muntyaz by itself does not support the theory of grave provocation specially when Pawan Kumar was found with his hands tied. Not a single witness was examined on behalf of the defence nor is there any material to support such theory. What kind of provocation and in what manner was it made are all matters of evidence, which are completely absent on record. In the circumstances, we do not find any circumstance or material to support the second submission advanced on behalf of accused Mumtaz @ Muntyaz. We, therefore, reject the second submission as well.

16. It is true that in the dying declaration Ext. A-24, the deceased had stated that he did not know the person who extinguished the fire by pouring water. It could be that while he was in flames, the deceased could not identify the person who tried to save him. The prompt lodging of the FIR and the fact that one of the eyewitnesses was having burn injuries establishes the presence of the eyewitnesses. In any case, even if the eyewitness account is taken to be inconsistent with this part of the dying declaration, once the dying declaration is found reliable, trustworthy and consistent with circumstantial evidence on record, such dying declaration by itself is adequate to bring home the case against the accused.

17. Having gone through the material on record, we do not see any reason to upset the findings recorded by the Trial Court and the High Court regarding conviction and sentence of appellant Mumtaz @ Muntyaz. Confirming his conviction and sentence we dismiss Criminal Appeal No.2084 of 2009 preferred by appellant Mumtaz @ Muntyaz.

18. As regards Dilshad@Pappu, by order dated 7.08.2014 District and Sessions Judge, Roorkee was directed to cause inquiry with regard to juvenility of the appellant. The report dated 5.09.2014, clearly shows that on considering the entirety of the matter the claim was found to be acceptable. The counsel appearing for the State could not refute or rebut the fact that his date of birth was 22.07.1974 and that on the date of occurrence he was 16 years 5 months and 5 days old.

19. Thus, on the date of occurrence Dilshad @ Pappu was more than 16 years of age but less than 18 years of age. In terms of the Juvenile Justice Act, 1986(hereinafter referred to as "the 1986 Act") which was in force at that time, he was not a juvenile and was rightly tried and convicted by the Trial Court vide its judgment dated 19.12.1994. While the appeal against his conviction and sentence was pending, on and with effect from 1.04.2001, the 2000 Act came into force which repealed the 1986 Act. The 2000 Act inter alia raised the age of juvenility from 16 to 18 years and in terms of Section 20 of the 2000 Act, the determination of Juvenility was required to be done in all pending matters in accordance with Section 2(1) of the 2000 Act.

20. The effect of Section 20 of the 2000 Act was considered in Pratap Singh v. State of Jharkhand and another[3] and it was stated as under:

> "31. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with a non obstante clause. The sentence "notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act are relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or the girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that court as if the 2000 Act has 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, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile."

21. In Bijender Singh v. State of Haryana and another[4], the legal position as regards Section 20 was stated in following words:

> "8. One of the basic distinctions between the 1986 Act and the 2000 Act relates to the age of males and females. Under the 1986 Act, a juvenile means a male juvenile who has not attained the age of 16 years, and a female juvenile who has not attained the age of 18 years. In the 2000 Act, the distinction between male and female juveniles on the basis of age has not been maintained. The age-limit is 18 years for both males

and females.

9. A person above 16 years in terms of the 1986 Act was not a juvenile. In that view of the matter the question whether a person above 16 years becomes "juvenile" within the purview of the 2000 Act must be answered having regard to the object and purport thereof.

10. In terms of the 1986 Act, a person who was not juvenile could be tried in any court. Section 20 of the 2000 Act takes care of such a situation stating that despite the same the trial shall continue in that court as if that Act has not been passed and in the event, he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgment of conviction, if any, but instead of passing any sentence in relation to the juvenile, he would be forwarded to the Juvenile Justice Board (in short "the Board") which shall pass orders in accordance with the provisions of the Act as if it has been satisfied on inquiry that a juvenile has committed the offence. A legal fiction has, thus, been created in the said provision. A legal fiction as is well known must be given its full effect although it has its limitations. .....

11. .....

12. Thus, by reason of legal fiction, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing, which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose."

22. In Dharambir v. State (NCTof Delhi) and another[5] the determination of juvenility even after conviction was one of the issues and it was stated:

"11. It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1-4-2001, when the Act of 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed.

12. Clause (l) of Section 2 of the Act of 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the

provisions of the Act of 2000."

23. Similarly in Kalu v. State of Haryana[6] this Court summed up as under:

> "21. Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the Juvenile Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile 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 Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1-4-2001, when the Juvenile Act came into force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed."

24. It is thus well settled that in terms of Section 20 of the 2000 Act, in all cases where the accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the Court would continue and be taken to the logical end subject to an exception that upon finding the juvenile to be guilty, the Court would not pass an order of sentence against him but the juvenile would be referred to the Board for appropriate orders under the 2000 Act.

25. What kind of order could be passed in a matter where claim of juvenility came to be accepted in a situation similar to the present case, was dealt with by this Court in Jitendra Singh and another v. State of U.P. (supra) in following terms:

> "32. A perusal of the "punishments" provided for under the Juvenile Justice Act, 1986 indicate that given the nature of the offence committed by the appellant, advising or admonishing him [clause (a)] is hardly a "punishment" that can be awarded since it is not at all commensurate with the gravity of the crime. Similarly, considering his age of about 40 years, it is completely illusory to expect the appellant to be released on probation of good conduct, to be placed under the care of any parent, guardian or fit person [clause (b)]. For the same reason, the appellant cannot be released on probation of good conduct under the care of a fit institution [clause (c)] nor can he be sent to a special home under Section 10 of the Juvenile Justice Act, 1986 which is intended to be for the rehabilitation and reformation of delinquent juveniles [clause (d)]. The only realistic punishment that can possibly be awarded to the appellant on the facts of this case is to require him to pay a fine under clause (e) of Section 21(1) of the Juvenile Justice Act, 1986."

26. In Jitendra Singh and another v. State of U.P. (supra), having found the juvenile guilty of the offence with which he was charged, in accordance with the law laid down by this Court as stated above, the matter was remanded to the jurisdictional Juvenile Justice Board constituted under the 2000 Act for determining appropriate quantum of fine. The view taken therein is completely consistent with the law laid down by this Court and in our opinion the decision in Jitendra Singh and another v. State of U.P. (supra) does not call for any reconsideration. The subsequent repeal of the 2000 Act on and with effect from 15.01.2016 would not affect the inquiry in which such claim was found to be acceptable. Section 25 of the 2015Act makes it very clear.

27. Thus, while holding appellant Dilshad @ Pappu to be juvenile in terms of the 2000 Act as on the day of occurrence and guilty of the offence with which he was tried, we set aside the sentence of life imprisonment passed against him and remit the matter to the Jurisdictional Juvenile Justice Board for determining the appropriate quantum of fine that should be levied on the appellant Dilshad @ Pappu and the compensation that should be awarded to the family of the deceased, keeping in mind the directions issued in Jitendra Singh and another v. State of U.P. (supra).

28. Criminal Appeal No.2084 of 2009 is thus dismissed while Criminal Appeal No.460 of 2010 is allowed to the aforesaid extent and the matter as regards Appellant Dilshad @ Pappu stands remitted to the Jurisdictional Juvenile Justice Board for determination as aforesaid. The bail bonds furnished by Appellant Mumtaz alias Muntyaz are cancelled and he shall be taken in custody forthwith to undergo the sentence awarded to him.

.....J.....J
(V. Gopala Gowda)

.....J (Uday Umesh Lalit)

New Delhi
July 1, 2016

---

[1] (2013) 11 SCC 193
[2] (2002) 6 SCC 710
[3] (2005)3 SCC 551
[4] (2005) 3 SCC 685
[5] (2010) 5 SCC 344
[6] (2012) 8 SCC 34