Bharat Bhushan vs State Of H.P on 26 April, 2013

Equivalent citations: AIR 2013 SUPREME COURT 2018, 2013 (11) SCC 274, 2013 AIR SCW 2911, AIR 2013 SC (CRIMINAL) 1311, 2013 (6) SCALE 456, 2013 CRILR(SC MAH GUJ) 725, 2014 (1) SCC (CRI) 576, 2013 ALL MR(CRI) 2199, (2013) 3 CRILR(RAJ) 725, (2013) 4 KCCR 353, (2013) 3 ALLCRILR 450, 2013 CRILR(SC&MP) 725, (2013) 2 MAD LJ(CRI) 773, (2013) 55 OCR 703, (2013) 3 RECCRIR 80, (2013) 2 CURCRIR 531, (2013) 6 SCALE 456, (2013) 2 DLT(CRL) 846, (2013) 121 ALLINDCAS 659 (GAU), (2013) 2 CRIMES 318, 2013 (2) ALD(CRL) 196, 2013 (2) KLT SN 151 (KER)

Author: T.S. Thakur

Bench: Dipak Misra, T.S. Thakur

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 628-629 OF 2013
(Arising out of S.L.P (Crl.) Nos.5059-60 of 2012)

Bharat Bhushan …Appellant

Versus

State of Himachal Pradesh …Respondent

J U D G M E N T

T.S. THAKUR, J.

1. Delay condoned.

2. Leave granted.

3. These appeals arise out of judgments and orders dated 8th April, 2010 and 30th April, 2010 passed by the High Court of Himachal Pradesh at Shimla whereby Criminal Appeal No.406 of 1995 has been allowed, the order of acquittal passed by the trial Court set aside, the appellant convicted for an offence punishable under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of five years besides a fine of Rs.50,000/-. In default of payment of fine, the appellant has been directed to undergo further imprisonment for a period of one year.

4. The appellant was charged with commission of an offence of rape upon a girl hardly 11 years old while she was working in the fields along with another girl aged around 10 years in Village Kanda, District Shimla, Himachal Pradesh. At the trial, the prosecution examined not only the prosecutrix who supported the charge but also other witnesses including PW- 2-her companion whose name is withheld to protect her identity and who had escaped an attempted assault by the co-accused, Dinesh Kumar. An alarm raised by PW-2 appears to have attracted the attention of PW-3-Piar Devi, mother of PW-2, who had rushed to the spot to rescue the girls, whereupon both the accused appears to have fled away. PW-5-Misru-the father of the prosecutrix and PWs-7, 8 and 9 namely Dr. Ajay Negi, Dr. Suresh Bansal and Dr. D.C. Negi were also examined at the trial all of whom have supported the prosecution case in their respective depositions. The trial Court, however, came to the conclusion that the prosecution had failed to prove its case against the appellant, the deposition of the witnesses mentioned above notwithstanding and, accordingly, acquitted both the accused persons of the charges framed against them.

5. Criminal Appeal No.406 of 1995 was then filed by the State of Himachal Pradesh against the order of acquittal to assail the view taken by the trial Court qua the appellant as also his companion Dinesh Kumar. The High Court has by its judgment and order dated 8th April, 2010 allowed the appeal in part, reversed the view taken by the trial Court and convicted the appellant for rape, punishable under Section 376 of the Indian Penal Code. As regards Dinesh Kumar, the High Court was of the view that the order of acquittal passed in his favour was justified. The High Court was of the view that the prosecution story was reliable and inspired confidence not only because of the inherent worth of the deposition of the prosecutrix but also because of the fact that her story was fully corroborated by PW-2, the other girl who escaped from the clutches of Dinesh Kumar, the co-accused and that of PW-3 Piar Devi who had rushed to the place of occurrence to rescue the victim after hearing an alarm raised by her daughter. More importantly, the High Court found that the deposition of Dr. Suresh Bansal who had examined the prosecutrix establish the commission of rape upon the victim. The appellant was on such re-appraisal of evidence convicted under Section 376 of the Indian Penal Code.

6. The High Court next examined the question of sentence to be awarded to the appellant and by separate order dated 30th April, 2010 sentenced the appellant to rigorous imprisonment for five years and a fine of Rs.50,000/- and a default sentence of one year as already noticed above. What is important is that while doing so the High Court noticed and rejected the contention urged on behalf of the appellant that he was only 16 years and 4 months old at the time offence was committed, hence, entitled to the benefit of provisions of Section 20 of the Juvenile Justice (Care and Protection

of Children) Act, 2000. Relying upon the decision of a Constitution Bench of this Court in Pratap Singh v. State of Jharkhand and Anr. (2005) 3 SCC 551, the High Court held that the benefit of the Act was not legally available to the petitioner.

7. The High Court also relied upon the decisions of this Court in Jameel v. State of Maharashtra (2007) 11 SCC 420, where this Court held that since the appellant in that case had completed 16 years of age as on the date of the occurrence, the Juvenile Justice (Care and Protection of Children) Act, 2000, Act had no application. Reliance was also placed by the High Court upon the decision of this Court in Ranjit Singh v. State of Haryana (2008) 9 SCC 453 where this Court had relying upon the Judgment in Jameel's case (supra) rejected the contention that the petitioner was entitled to the benefit of Juvenile Justice (Care and Protection of Children) Act, 2000, since he was below 18 years as on the date of the commission of the offence. In conclusion, the High Court held that Section 20 of the 2000 Act was inapplicable since the accused was over 16 years of age at the time of commission of the offence i.e. 22nd June, 1993 and over 18 years of age on 01-04-2001, the date when the 2000 Act came into force. The present appeal filed by the appellant assails the correctness of the above two orders as already noticed earlier.

8. We have heard learned Counsel for the parties at some length. The legal position regarding the entitlement of the appellant who was more than 16 years but less than 18 years of age as on the date of commission of the offence on 22nd June, 1993, is in our view settled by the decision of this Court in Hari Ram v. State of Rajasthan (2009) 13 SCC 211. This Court has in that case traced the history of the legislation and reviewed the entire case law on the subject. Relying upon the decision of the Constitution Bench of this Court in Pratap Singh's case (supra), this Court in Hari Ram's case (supra) reiterated that the question of juvenility of a person in conflict with law has to be determined by reference to the date of the incident and not the date on which cognizance is taken by the Magistrate. Having said that, this Court held that the effect of the pronouncement in Pratap Singh's case (supra) on the second question, viz. whether the 2000 Act was applicable in a case where the proceedings were initiated under the 1986 Act and were pending when the 2000 Act came into force, stood neutralised by the amendments to Juvenile Justice (Care and Protection of Children) Act, 2000, by Act 33 of 2006. The amendments made the provisions of the Act applicable even to juveniles who had not completed the age of 18 years on the date of the commission of offence said this Court. Speaking for the Court Altamas Kabir, J. (as His Lordship then was) observed:

> "58. Of the two main questions decided in Pratap Singh case, one point is now well established that the juvenility of a person in conflict with law has to be reckoned from the date of the incident and not from the date on which cognizance was taken by the Magistrate. The effect of the other part of the decision was, however, neutralised by virtue of the amendments to the Juvenile Justice Act, 2000, by Act 33 of 2006, whereunder the provisions of the Act were also made applicable to juveniles who had not completed eighteen years of age on the date of commission of the offence.
>
> 59. The law as now crystallised on a conjoint reading of Sections 2(k), 2(l), 7-A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were

> below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted.

xxxxxxxxx xxxxxxxxx

68. Accordingly, a juvenile who had not completed eighteen years on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act."

9. These decisions have been followed in several other subsequent pronouncements of this Court including the decisions of this Court in Raju and Anr. v. State of Haryana (2010) 3 SCC 235, Dharambir v. State (NCT of Delhi) and Anr. (2010) 5 SCC 344, Mohan Mali and Anr. v. State of M.P. (2010) 6 SCC 669, Jitendra Singh @ Babboo Singh and Anr. v. State of U.P. (2010) 13 SCC 523, Daya Nand v. State of Haryana (2011) 2 SCC 224, Shah Nawaz v. State of U.P. and Anr. (2011) 13 SCC 751 and Amit Singh v. State of Maharashtra and Anr. (2011) 13 SCC 744.

| |

10. The attention of the High Court was, it is obvious, not drawn to the decision in Hari Ram's case (supra), although the same was pronounced on 5th May, 2009 i.e. almost a year earlier to the pronouncement of the impugned judgment in this case. Be that as it may, as on the date the offence was committed the appellant was admittedly a juvenile having regard to the provisions of Sections 2(k), 2(l), 7-A, 20 and 49 read with Rules 12 and 98 of the Rules framed under the Juvenile Justice (Care and Protection of Children) Act, 2000. He was, therefore, entitled to the benefit of the said provision, which benefit, it is evident, has been wrongly denied by the High Court only because the High Court remained oblivious of the pronouncement of this Court in Hari Ram's case (supra).

11. The question then is whether the High Court could have at all recorded a conviction against the appellant who as seen above was a juvenile on the date of the commission of the offence. The answer to that question, in our opinion, lies in Section 20 of the 2000 Act which reads as under:

> "20. Special provision in respect of pending cases.- 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 comes into force in that area, shall be continued in that court as if this 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 this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.

> Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.
>
> Explanation.- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of Clause (1) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

12. The above makes it manifest that proceedings pending against a juvenile in any Court as on the date the 2000 Act came into force had to continue as if the 2000 Act had not been enacted. More importantly Section 20 (supra) obliges the Court concerned to record a finding whether the juvenile has committed any offence. If the Court finds the juvenile guilty, it is required under the above provision to forward the juvenile to the Board which would then pass an order in accordance with the provisions of the Act as if it had been satisfied on enquiry under the Act that the juvenile had committed an offence.

13. Even in Pratap Singh's case (supra), this Court had interpreted Section 20 of the 2000 Act, and held that Section 20 was attracted to cases where the person, if male, had ceased to be a juvenile under the 1986 Act being more than 16 years of age but had not yet crossed the age of 18 years. This Court declared that it was only in such cases that Section 20 was attracted and the Court required to record its conclusion as to the guilt or innocence of the accused. This Court observed:

> "31. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with 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 date of 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 is 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 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." (emphasis supplied)

14. Reference may also be made to the decision of this Court in Bijender Singh v. State of Haryana and Anr. (2005) 3 SCC 685, where this Court reiterated the legal position while interpreting the provisions of the Act and said:

> "8. One of the basic distinctions between the 1986 Act and the 2000 Act relates to 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...

xx xx xx

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." (emphasis supplied)

15. Section 20 of the 2000 Act fell for interpretation even in Dharambir v. State (NCT of Delhi) (2010) 5 SCC 344, where too this Court held that the explanation appended to the same enables the Court to determine the juvenility of the accused even after conviction and that the Court can while maintaining the conviction set aside the sentence imposed upon him and to forward the case to the Board for passing an appropriate order under the Act. This Court observed:

> "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 1st April, 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. 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."

16. The above position was restated in Daya Nand v. State of Haryana (2011) 2 SCC 224 and Kalu @ Amit v. State of Haryana (2012) 8 SCC 34.

17. In the present case, the appellant was not a juvenile under the 1986 Act as he had crossed the age of 16 years. This case was, however, pending before the High Court in appeal on the date the 2000 Act came into force and had, therefore, to be dealt with under Section 20 of the Act which required the High Court to record a finding about the guilt of the accused but stop short of passing an order of sentence against him. Inasmuch as the High Court convicted the appellant, it did not commit any mistake for the power to do so was clearly available to the High Court under the provisions of Section 20. What was not permissible was passing of a sentence for which purpose the High Court was required to forward the juvenile to the Juvenile Board constituted under the Act. The order of sentence is, therefore, unsustainable and shall have to be set aside.

18. The next question then is whether the conviction recorded by the High Court was justified on merits and, if it was, whether we ought to refer the appellant to the Juvenile Justice Board at this stage. Our answer is in the affirmative qua the first part and negative qua the second. The High Court has, in our opinion, properly appreciated the evidence on record especially the deposition of the prosecutrix, her companion PW-2 and her aunt Piar Devi-PW-3 as also her parents. The High Court has also correctly appreciated the medical evidence available on record especially the deposition and the report of PW-8-Dr. Suresh Bansal, the relevant portion of whose report reads as under:

> "...On examination I found that the female child had not started menstruating. There was painful separation of thighs. No marks of violence were present. Clotted blood was present on labia majora and on thighs. Secondary sexual characters were developed. Breasts were developed according to age. Pubic and axillary hairs were present but were scanty. Hymen was freshly fractured. Posterior fourchette was torn. The chid admitted one little finger with pain. The vagina was congested..... Injury mentioned in MLC Ext. PW-8/C appeared on the prosecutrix was subject to sexual intercourse..."

19. The prosecutrix was between 9 to 12 years according to the deposition of PW-9-Dr. D.C. Negi and deposition of PW-13 who proved her date of birth to be 13th April, 1982. The presence of human blood on the cap with which the appellant appears to have wiped the blood after the sexual assault is

also an incriminating circumstance which the High Court has rightly taken into consideration while finding the appellant guilty. We, therefore, see no reason to interfere with the order of conviction as recorded by High Court on merits.

20. Coming then to the question of reference to the Juvenile Justice Board, we are of the view that such a reference is unnecessary at this distant point of time. The appellant is nearly 36 years old by now and a father of three children. He has already undergone nearly three years of imprisonment awarded to him by the High Court. In the circumstances, reference to the Juvenile Justice Board at this stage of his life would, in our opinion, serve no purpose. The only option available is to direct his release from custody.

21. In the result, we dismiss criminal appeal arising out of SLP (Crl.) No.5059 of 2012 directed against the order of the High Court dated 8th April, 2010 and uphold the conviction of the appellant for the offence under Section 376 IPC. Criminal appeal arising out of SLP (Crl.) No.5060 of 2012 is, however, allowed and the order dated 30th April, 2010 passed by the High Court is set aside with a direction that the appellant shall be released from custody unless he is required in connection with any other case.

.....J. (T.S. THAKUR) .....J. (DIPAK MISRA) New Delhi April 26, 2013