

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
AT SRINAGAR**

Reserved on: 05.04.2022
Pronounced on:08.04.2022

CRMC No.199/2017

c/w

Cr. Appeal No.11/2016

ISHFAQ AHMAD NAJAR

... PETITIONER(S)

*Through: - Mr. Moulvi Ajaz, Advocate
with Mr. Zaman Irshad, Advocate.*

Vs.

STATE OF J&K

...RESPONDENT(S)

*Through: - Mr. Asif Maqbool, Dy. AG, vice Mr. Sajad
Ashraf, GA.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) By this common order, petition filed by the petitioner under Section 561-A of J&K Cr. P. C and appeal filed by him against the judgment of conviction and sentence dated 28.04.2016 passed by learned Chief Judicial Magistrate, Budgam, against the petitioner, are proposed to be disposed of.

2) It emerges from the record that a challan for commission of offence under Section 377 RPC came to be filed against the petitioner herein before learned Chief Judicial Magistrate, Budgam. The challan owed its origin to FIR No.105/2009 of Police Station Chadoora. It appears that

during the pendency of the trial, the petitioner had filed an application before the learned Chief Judicial Magistrate seeking a declaration that he is a juvenile. The said application was filed on 24.08.2009. The application came to be dismissed by the learned Magistrate vide his order dated 28.04.2016 on the ground that at the time of the occurrence i.e., 10.06.2009, the provisions of the Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act, 1997 (hereinafter referred to as the Act of 1997), were in operation and, as such, only a person who was below 16 years of age qualified to be a juvenile. The learned Magistrate observed that since petitioner was more than 16 years of age at the time of the occurrence, as such, he cannot be declared as juvenile and that he cannot take benefit of the definition of juvenile as given in Section 2(n) of the J&K Juvenile Justice (Care and Protection of Children) Act, 2013 (hereinafter to as the Act of 2013).

3) The aforesaid order came to be challenged by the petitioner before the Revisional Court i.e., Court of Sessions Judge, Budgam. However, by the time the revision petition came up for consideration, the petitioner came to be convicted by the trial court in terms of the judgment dated 28.04.2016 and the learned Sessions Judge held that the revision petition has been rendered infructuous.

4) The judgment of conviction and sentence passed by learned Chief Judicial Magistrate, Budgam, on 28.04.2016, has been assailed by the petitioner by way of a regular appeal and at the same time he has invoked jurisdiction of this Court under Section 561-A of J&K Cr. P. C seeking a

direction that the petitioner be declared as juvenile in conflict with law and that he may be admitted to bail.

5) It appears that vide order dated 12th October, 2017, this Court directed the Registrar Judicial to hold an enquiry for determination of status of juvenility claimed by the petitioner. Pursuant to the aforesaid direction, the Registrar Judicial submitted his report in which it has been reported that age of the petitioner at the time of the alleged occurrence i.e., on 10th June, 2009, was 17 years 07 months and 05 days.

6) It has been contended by learned counsel for the petitioner that even if the occurrence had taken place at the time when the provisions of the of the Act of 1997 were in force, which provided for age of juvenility as less than 16 years, still then the age of juvenility of the petitioner should have been determined with reference to the legal provisions which were in force at the time when his claim of juvenility was considered by the trial court.

7) I have heard learned counsel for the parties and perused the record of the case.

8) The short point involved in this case is as to which law would be applicable to the instant case, whether it would be the law that was in force at the time when the occurrence took place or the law that was in force when the application of the petitioner claiming juvenility was considered by the trial court.

9) The occurrence, which is subject matter of the case, is alleged to have taken place on 10.06.2009. At the relevant time the provisions of the

Act of 1997 were in operation. The rules in pursuance of the Act of 1997 were framed in the year 2007. In the year 2013, J&K Juvenile Justice (Care and Protection of Children) Act, 2013 came into force and by virtue of Section 69 of the said Act, the Act of 1997 came to be repealed. It is pertinent to mention here that as on the date of coming into operation of the Act of 2013, the trial of the case was going on before the learned trial court. The Act of 2013 contains a special provision in respect of pending proceedings in the shape of Section 21, which reads as under:

“21. Special provision in respect of pending cases.—
Notwithstanding anything contained in the Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Act comes 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 the 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 conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (n) of section 2, even if the juvenile ceases to be so on or before the date of commencement of the Act and the provisions of the 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.”

10) From a bare perusal of the aforesaid provision, particularly explanation thereto, it becomes clear that even in pending cases including

trial, revision or appeal, the determination of juvenility of a juvenile in conflict with law has to be undertaken in terms of Clause (n) of Section 2 of the Act of 2013 even if the juvenile ceases to be so on or before the date of commencement of the Act. The explanation further provides that the provisions of the Act shall apply, as if the said provisions had been in force for all purposes when the alleged offence was committed. The purport of this provision is that even in the case of pending matter or matters, which are at the revisional or appellate stage or in other words, which have not acquired finality, the issue with regard to determination of juvenility of a child in conflict with law has to be governed by the provisions contained in the Act of 2013. It is pertinent to mention that in terms of the Act of 1997, the age of juvenility in case of a male child was fixed as upto 16 years, whereas in terms of Section 2 (n) of the Act of 2013, the same has been fixed as 18 years.

11) Thus, it is clear that in the instant case, the fact that the trial of the case was pending as on date of coming into force of the Act of 2013 makes it clear that we have to approach this case in accordance with the provisions contained in the Act of 2013 and consequently, the age of juvenility with reference to this case has to be taken as 18 years and not 16 years, which was the age of juvenility under the Act of 1997, that was in force at the time of commission of the alleged occurrence.

12) I am supported in my aforesaid view by the judgment of the Hon'ble Supreme Court rendered in the case titled "**Hari Ram Vs. State of Rajasthan and Anr., (2009) 13 SCC 211**", wherein the Hon'ble

Supreme Court, after taking into consideration effect of Section 20 of the Juvenile Justice Act, 2001 (*hereinafter referred to as the "Act of 2001"*), which is in *para materia* with Section 8 of the Act of 2013, came to the conclusion that the provisions of the Juvenile Justice Act, 2000 (*hereinafter referred to as the "Act of 2000"*) have been given retrospective effect and, accordingly, the Court held that a juvenile, who had not completed 18 years on the date of commission of the offence was also entitled to the benefits of the Act of 2000, as the provisions of Section 2(k) of the said Act had always been in existence even during the operation of 1986 Act. As a corollary to the aforesaid ratio laid down by the Supreme Court, it can be safely held that a juvenile, who had not completed the age of 18 years on the date of commission of offence, was also entitled to the benefit of the Act of 2013, as if the provisions of Section 2(n) of the Act of 2013 had always been in existence even during the operation of the Act of 1997.

13) From the foregoing enunciation of law on the subject, it is clear that even if on the date of the occurrence, the provisions of the Act of 1997 were in operation, still then, because the trial of the case was pending at the time of coming into force of the Act of 2013, the age of juvenility of the petitioner had to be determined with reference to the definition of juvenile as contained in Section 2(n) of the Act of 2013, meaning thereby if the petitioner was found to be less than 18 years of age at the time of alleged occurrence, the benefit of juvenility had to be extended to him.

14) As per the enquiry report of the Registrar Judicial, the of the petitioner on the date of occurrence was 17 years 07 months and 05 days i.e., less than 18 years. While coming to the aforesaid conclusion, the Registrar Judicial has relied upon the certificate issued by the J&K State Board of School Education and the discharge certificate issued by Higher Secondary Institute, Panzgam Budgam, according to which his date of birth is 05.11.1991. Thus, the order passed by the learned Chief Judicial Magistrate, Budgam, holding that the petitioner was not a juvenile as he was aged more than 16 years at the time of the occurrence, is contrary to the legal position and is not sustainable in law.

15) Having held that the petitioner was a juvenile at the time of the occurrence, the proceedings against him had to be conducted in accordance with the provisions contained in the Act of 2013 but he has been tried under the procedure provided for adult accused. The trial of the petitioner before the learned Chief Judicial Magistrate is, therefore, without jurisdiction and is vitiated. The order of conviction and sentence passed against the petitioner by the learned Magistrate, being without jurisdiction, cannot be sustained in law.

16) The Supreme Court has, in a similar situation, in the case of **Raju vs. State of Punjab**, 2019(4) SCALE 398, while allowing the appeal against the judgment of conviction and sentence passed against a juvenile, observed as under:

“9. It is by now well settled, as was held in Hari Ram v. State of Rajasthan, (2009) 13 SCC 211, that in light of Sections 2(k), 2(l), 7A read with Section 20 of the 2000 Act

as amended in 2006, a juvenile who had not completed eighteen years on the date of commission of the offence is entitled to the benefit of the 2000 Act (also see Mohan Mali v. State of Madhya Pradesh, (2010) 6 SCC 669; Daya Nand v. State of Haryana, (2011) 2 SCC 224; Dharambir v. State (NCT) of Delhi (supra); Jitendra Singh @ Babboo Singh v. State of Uttar Pradesh, (2013) 11 SCC 193). It is equally well settled that the claim of juvenility can be raised at any stage before any Court by an accused, including this Court, even after the final disposal of a case, in terms of Section 7A of the 2000 Act (see Dharambir v. State (NCT) of Delhi, (supra), Abuzar Hossain v. State of West Bengal, (2012) 10 SCC 489; Jitendra Singh @ Babboo Singh v. State of UP, (supra); Abdul Razzaq v. State of Uttar Pradesh, (2015) 15 SCC 637).

10. In light of the above legal position, it is evident that the Appellant would be entitled to the benefit of the 2000 Act if his age is determined to be below 18 years on the date of commission of the offence. Moreover, it would be irrelevant that the plea of juvenility was not raised before the Trial Court, in light of Section 7A. As per the report of the inquiry conducted by the Registrar (Judicial) of this Court, in this case, the Appellant was below 18 years of age on the date of commission of the offence. The only question before us that needs to be determined is whether such report may be given precedence over the contrary view taken by the High Court, so that the benefit of the 2000 Act may be given to the Appellant.

25. Criminal Appeal hereby stands allowed and the order of the High Court affirming the conviction and sentence of the Appellant under Section 376(2)(g) of the IPC is set aside. Seeing that the Appellant has already spent 6 years in imprisonment, whereas the maximum period for which a juvenile may be sent to a special home is only 3 years as per Section 15(1)(g) of the 2000 Act, and since the Appellant has already been enlarged on bail by virtue of the order of the Court dated 09.05.2014, he need not be taken into custody. His bail bonds stand discharged and all proceedings against him, so far as they relate to the present case, stand terminated."

17) The ratio laid down in the aforesaid case by the Supreme Court is squarely applicable to the facts of the instant case, inasmuch as the trial of the petitioner has been conducted by a court which had no jurisdiction to do so. Therefore, without going into merits of the appeal, the same

deserves to be allowed. Even otherwise, perusal of the record reveals that the petitioner has been in custody during trial of the case and after his conviction by the trial court for about two years and as per the provisions of the Act of 2013, a juvenile cannot be kept in special home for a period of more than three years.

18) For the foregoing reasons, this Court is of the opinion that the petitioner was a juvenile on the date of commission of the offence and he has already undergone considerable jail sentence, partly as an under-trial and partly as a convict and, as such, the appeal filed by him deserves to be allowed and the same is, accordingly, allowed without going into merits of the case and without passing any consequential order of holding of fresh trial against the petitioner in accordance with the provisions of the J&K Juvenile Justice (Care and Protection of Children) Act, 2013, or subsequent legislation that has come into operation.

19) The trial court record be sent back.

(Sanjay Dhar)
Judge

Srinagar

08.04.2022

"Bhat Altaf, PS"

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No