

(2011) 04 MAD CK 0389
In the Madras High Court
Case No : H.C.P. No. 2331 of 2010

A. Chinnaponnu

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 26-04-2011

Acts Referred:

Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 15, 16, 64, 7A(1)

Penal Code, 1860 (IPC) — Section 147, 149, 302, 323

Citation : (2011) 8 RCR(Criminal) 663

Hon'ble Judges : P.R. Shiva kumar, J;C. Nagappan, J

Bench : Division Bench

Advocate : R. Sankarasubbu, for S. Manoharan, for the Appellant; A.D. Jagadish Chandira, Assistant Public Prosecutor, for the Respondent

Judgement

P.R. Shiva kumar, J.—The Petitioner is the mother of the convict prisoner Velu @ Velmurugan (convict No. 79319) son of Annamalai, who is now under detention in Central Prison, Coimbatore on having been convicted by the trial court (III Additional Sessions Judge, Salem) for the offences under Sections 147 IPC, 302 r/w 149 IPC and 323 IPC (2 counts) and the conviction and sentence having been confirmed by this Court in an appeal preferred against the judgment of the trial court.

2. The present Habeas Corpus Petition has been filed seeking a direction in the nature of writ of habeas corpus directing the production of the above said detenu Velu @ Velmurugan before this Court and pass an order setting him at liberty on the premise that the said convict is entitled to the benefits of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by Act 33 of 2006, since on the date of occurrence he had not completed the age of 18 years.

3. The detenu concerned in this HCP, namely Velu @ Velmurugan figured as the 5th accused in Sessions Case No. 6/1999 on the file of the III Additional Sessions Judge, Salem. Along with him four other persons were also prosecuted in the

said sessions case. After trial, the trial court found the detenu, who figured as the 5th accused in the said case, guilty of the offences punishable under Sections 147, 302 r/w 149 and 323 (2 counts) IPC and sentenced him to undergo rigorous imprisonment for a period of six months for the offence u/s 147 IPC, life imprisonment for the offence u/s 302 r/w 149 IPC and rigorous imprisonment for six months in respect of each count of the offence u/s 323 IPC. Challenging the conviction and sentence, an appeal was preferred by all the accused in CrI.A. No. 785/2001 on the file of this Court. After hearing, this Court (Division Bench) dismissed the appeal in toto and confirmed the conviction and sentence as per the judgment of the trial court. The said judgment of this Court was pronounced on 01.09.2005. Pursuant to the dismissal of the said appeal, all the accused including the detenu concerned in this HCP surrendered on 04.10.2005 before the learned I Additional Sessions Judge, Salem and were sent to the prison for undergoing sentence. Prior to the said date, he was in confinement in two spells, first one as remand prisoner between 31.03.1996 to 11.05.1996 and the second one as a convict after the pronouncement of the judgment of the trial court between 21.06.2001 to 11.09.2001.

4. It is the contention raised by the Petitioner on behalf of the detenu that the detenu is entitled to the benefit of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by Act 33 of 2006, since he was a juvenile in accordance with the definition of the said term found in the Act, in so far as he had not completed the age of 18 years as on the date of commission of the offences for which he was prosecuted and convicted. It is the contention of the Petitioner that though the case might have been disposed of and the appeal might have been concluded, if the detenu (convict) happened to be a person having not completed the age of 18 years as on the date of occurrence, then at any point of time, before any court, the plea of juvenility can be raised and necessary relief can be sought for.

5. In support of the claim of the Petitioner that the detenu had not completed the age of 18 years and was a juvenile on the date of commission of the offences, the Petitioner has produced copies of SSLC certificate and Higher Secondary Course certificate issued by the Board of Secondary Education, Tamil Nadu and Board of Higher Secondary Examination, Tamil Nadu respectively. A copy of the transfer certificate has also been produced. They are found in pages 1, 2 and 3 of the typed set of papers. As per the entries found therein the detenu was born on 13.06.1978. The occurrence for which he was prosecuted and convicted took place on 26.03.1996. Based on the said documents, the learned Counsel for the Petitioner would submit that the detenu was aged below 18 years on the date of occurrence and the benefit of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by Act 33 of 2006, should be extended to the detenu and he should be set at liberty forthwith.

6. This Court directed the learned Additional Public Prosecutor to get instructions as to the genuineness of the said certificates. The third Respondent filed an

affidavit stating that, on verification after getting the original certificates, it was found that the certificates were that of the detenu and they were genuine. The learned Additional Public Prosecutor has also submitted that based on the materials placed by the Petitioner and based on the affidavit of the third Respondent, appropriate orders may be passed.

7. In support of the contention of the Petitioner, the following decisions of the Hon"ble Supreme Court have been cited:

(1) Jambulingam v. State Rep. by Inspector of Police (Crl.A. No. 1920/2008) disposed of by the Hon"ble Supreme Court on 25.11.2009;

(2) Babban Rai and Anr. v. State of Bihar reported in 2007 (11) Scale 1;

(3) Hariram v. State of Rajasthan and Anr. reported in (2010) 1Supreme Court Cases (Cri) 987; and

(4) Daya Nand v. State of Haryana reported in 2011 (1) Supreme 77

Apart from the above cited judgments of the Hon"ble Supreme Court, the following two orders of the earlier Division Benches made in 1) "Bhaskaran and A. Ram Kumar v. The State of Tamil Nadu and three Ors. (H.C.P. No. 822/2010 and W.P. No. 7142/2010, decided on 25.08.2010) and 2) "Arunachalam v. State and Ors. H.C.P. No. 1969/2010) decided on 03.03.2011 have also been relied on by the Petitioner.

8. Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by Act 33 of 2006 allows the claim of juvenility to be raised before any court at any stage of the proceedings on the ground that an accused was a juvenile on the date of commission of the offence. It also enjoins a duty on the court to make an enquiry regarding the age of the accused in all cases wherein the claim of juvenility is raised or the court is of the opinion that an accused person was a juvenile on the date of commission of the offence. In such a case, the court is to take such evidence as may be necessary so as to determine the age of such person and record a finding as to whether he was a juvenile or not as on the date of commission of offence. The proviso also makes it clear that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case and that such claim shall be determined in terms of the provisions of the Act and the rules made there under, even if the juvenile had ceased to be so on or before the date of commencement of the Act. For better appreciation the entire Section 7A of the Act is reproduced.

7A. Procedure to be followed when claim of juvenility is raised before any Court.

(1) Whenever a claim of juvenility is raised before any Court or a Court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the Court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any Court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made there under, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the Court finds a person to be a juvenile on the date of commission of the offence under Sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence, if any, passed by a Court shall be deemed to have no effect.

9. Proviso to Section 7A(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by Act 33 of 2006, allows the raising of a claim of juvenility at any stage of the proceedings and even after the final disposal of the case. However, the very same proviso indicates the procedure to be followed for determination of the claim of juvenility. It says that the claim shall be determined in terms of the provisions of the Act and the rules made there under. In order to give effect to the said statutory provision, rules have been made in Juvenile Justice (Care and Protection of Children) Rules, 2007.

10. Rule 12 of the said rules prescribes the procedure to be followed in determination of the age of an accused to find: i) whether he is juvenile or not and ii) the evidence based on which a decision regarding the age of the juvenile can be arrived at. Separate rules have been provided in Rules 97 and 98 of Juvenile Justice (Care and Protection of Children) Rules, 2007 for dealing with juveniles in conflict with law in pending cases and disposed of cases respectively. Section 7A(1) proviso makes it clear that the claim of juvenility can be made even after disposal of the case.

11. In the first of the judgments relied on by the learned Counsel for the Petitioner, namely *Jambulingam v. State* represented by Inspector of Police (Crl. Appeal No. 1920/2008 disposed on 25.11.2009), the Hon''ble Supreme Court has held that though the plea of juvenility was not taken either before the trial court or in the appeal before the High Court, there were ample materials on record to show that the Appellant therein, as on the date of occurrence, was a juvenile being below the age of 18 years and he was entitled to the benefit of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by Act 33 of 2006.

12. In *Babbanrai and Anr. v. State of Bihar* reported in 2007(11) SCALE 1 also, the claim of juvenility was entertained by the Supreme Court in an appeal on Special Leave against the judgment of the High Court confirming the conviction made by the trial court, holding that such a plea could be raised even at the stage of SLP before the Supreme Court.

13. In *Hariram v. State of Rajasthan and Anr.* reported in (2010) 1 Supreme Court Cases (Cri) 987, the Hon''ble Supreme Court held as follows:

59. The law as now crystallised on a conjoint reading of Sections 2(k), 2(l), 7A, 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.

xx xx xx

67. Section 7A of the Juvenile Justice Act, 2000, made provision for the claim of juvenility to be raised before any Court at any stage, as has been done in this case, and such claim was required to be determined in terms of the provisions contained in the 2000 Act and the Rules framed there under, even if the juvenile had ceased to be so on or before the date of commencement of the Act.

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.

14. In *Dayanand v. State of Haryana* reported in 2011 (1) Supreme 77 referring to the case of *Hariram v. State of Rajasthan* cited suppurate very same view was taken by the Hon''ble Supreme Court.

15. It is settled proposition that if a person accused of committing an offence was below the age of 18 years as on the date of commission of the offence, such person shall be entitled to the benefits of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by Act 33 of 2006, even though he might have completed the age of 18 years on the date of commencement of the said Act. It is also crystal clear that the plea of juvenility can be taken before any court at any stage of the proceedings and that such a claim can be made even after the disposal of the case. If the claim is made during inquiry or trial before a court, such court can take evidence and decide the sustainability of the claim of juvenility. If such a claim is raised in an appeal or revision, then the appellate court or the court of revision, as the case may be, can decide the question of sustainability of the claim of juvenility and grant the relief in accordance with the Act. An SLP and a criminal appeal before the Supreme Court is also a stage of the proceeding and if such a claim is made in such SLP or criminal appeal, there is no difficulty in granting such relief''s. Claiming such relief in the inquiry, trial, appeal, revision or SLP or appeal on Special Leave shall amount to raising a plea at any stage of the proceedings and in such cases, the concerned court shall decide the claim of juvenility. A difficulty may arise when a claim is to be made in a disposed of case, as to the forum in which such a claim is to be made. In this regard, it is pertinent to note that Section 7A of the Act itself states that an enquiry shall be conducted in which evidence as may be necessary (but not an affidavit) so as to determine the age of the person making the claim of juvenility

shall be taken and a finding whether the person is a juvenile or not shall be recorded, in which finding the age of the person as nearly as may be, should also be stated. Though the proviso to Section 7A(1) states that a claim of juvenility can be raised even after final disposal of the case, it has been further provided therein that such a claim shall be determined in terms of the provisions contained in the Act and the rules made there under. Section 20 of the Act provides the procedure to be adopted in pending cases. There is no specific provision in the Act as to which forum is to be approached for making the claim of juvenility after the disposal of the case. Section 64 of the Act provides for the transfer of juveniles in conflict with law who are undergoing any sentence of imprisonment to special homes or fit institutions and restrict such internment for a total period of three years as stipulated in Section 15 of the Act. The said section also does not refer to a forum which is to be approached for making the plea of juvenility. Therefore, we have to necessarily look to the Juvenile Justice (Care and Protection of Children) Rules, 2007. The relevant rules are Rule 97 and 98.

16. Rule 97 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 says that no juvenile shall be denied the benefits of the Act and the rules made there under and that all pending cases, which have not received finality, shall be dealt with and disposed of in terms of the provisions of the Act and the rules made there under.

17. Rule 98 deals with the procedure to be adopted in disposed off cases relating to juvenile in conflict with law. It reads as follows:

98. Disposed off cases of juveniles in conflict with law. -The State Government or as the case may be the Board may, either suo motu or on an application made for the purpose, review the case of a person or a juvenile in conflict with law, determine his juvenility in terms of the provisions contained in the Act and Rule 12 of these rules and pass an appropriate order in the interest of the juvenile in conflict with law u/s 64 of the Act, for the immediate release of the juvenile in conflict with law whose period of detention or imprisonment has exceeded the maximum period provided in Section 15 of the said Act.

18. A conjoint reading of Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by Act 33 of 2006, Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, shall make it clear that in disposed off cases, the Government or the Board may either suo motu or on an application, review the case of a person or a juvenile in conflict with law and determine his juvenility as on the date of commission of the offence and grant the relief in accordance with the provisions of the Act. The previous rule, namely Rule 97 deals with the procedure to be adopted in pending cases. In the case on hand, the appeal preferred before this Court reached finality in the judgment of this Court dated 01.09.2005. In addition to that, it is brought to the notice of this Court that a SLP preferred against the judgment of this Court before the Hon"ble Supreme Court in SLP (Crl) No. 176/2006 was also dismissed

on 16.01.2006. Hence it is clear that the case has attained finality. The procedures contemplated for deciding the claim of juvenility in a pending case which has not attained finality and a disposed of case, are different. But, as on date, it is a well settled proposition that, the plea of juvenility can be raised at any stage, even after the disposal of the case. The judgments of the Hon''ble Supreme Court relied on by the learned Counsel for the Petitioner, which have been listed above, clearly re-state the law on this subject to the effect that the plea of juvenility can be raised at any stage, even after the disposal of the case and the said judgments of the Hon''ble Supreme Court have also been followed by this Court in the two orders passed in the HC Ps cited supra. However, it is pertinent to note that in all the above said cases decided by the Supreme Court, the benefit of the Act was given on the plea of juvenility raised in pending proceedings, namely SL Ps or criminal appeals on Special Leave pending before the Supreme Court. In none of the above said cases decided by the Supreme Court, the plea of juvenility was raised after the disposal of the case before the Supreme Court. That is also the reason why the previous Division Benches of this Court chose to refrain from granting the relief on the plea of juvenility in the disposed off cases, when Habeas Corpus Petitions were filed and on the other hand, chose to direct the Juvenile Justice Board to consider the plea of juvenility in accordance with Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and pass appropriate orders in the interest of the juvenile u/s 64 of the Act, if the plea of juvenility is to be accepted. The same was done taking note of Rule 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 prescribing the procedure to be adopted in disposed off cases.

19. Of course no material has been placed to show that any representation was made to the Government or the Juvenile Justice Board. However, Rule 98 contemplates review of the cases of juvenile by the Government or the Juvenile Justice Board, either suo motu or on an application. Hence this Court is of the view that it shall be just and proper to dispose of this Habeas Corpus Petition directing the Juvenile Justice Board, Salem to review the case of the detenu Velu @ Velmurugan by conducting an enquiry regarding his date of birth and age as on the date of occurrence and pass necessary orders in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by Act 33 of 2006 and the rules made thereunder.

20. In fine, the Habeas Corpus Petition is disposed of with the following directions:

(a) The Respondents 2 and 3 are directed to produce the detenu Velu @ Velmurugan now confined in Central Prison, Coimbatore as convict prisoner (convict No. 79319) before the Juvenile Justice Board, Salem within a period of two weeks from the date of receipt of a copy of this order.

And

(b) The Juvenile Justice Board, Salem is directed to consider the claim of

juvility of the detenu Velu @ Velmurugan on his production in terms of Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and grant the relief in terms of Section 64 r/w Sections 15 and 16 of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by Act 33 of 2006, if it arrives at the conclusion that the plea of the juvility is to be sustained. Such an enquiry should be completed within a period of one month from the date of production of the detenu before it.