
(2011) 10 J&K CK 0015
In the Jammu And Kashmir High Court
Case No : Criminal Rev. No. 55 of 2011

Rouf Ahmad Alias Eelya and Another	Vs	APPELLANT
State and Others		RESPONDENT

Date of Decision : 29-10-2011

Acts Referred:

Ranbir Penal Code, 1989 — Section 302, 34

Citation : (2011) 4 JKJ 347

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hasnain Massodi, Judge

1. The petitioners are arraigned on the charge of having committed offence punishable u/s 302 read with 34 RPC. It is alleged that the petitioners

on 9.22009, waylaid one Hassan Teli, alias Mandan, S/o Gh. Nabi R/o Shah Mohalla Nawab Bazar and strangled him to death on Zainakot

HMT Road, Both the accused are admittedly below 16 years of age and juveniles within meaning of J&K Juvenile Justice Act. The petitioners

have been in Police custody and thereafter Judicial custody since their arrest sometime after the occurrence. The petitioners are also allegedly

involved in case FIR No. 35 of 2009 u/s 302/34 Police Station Parimpora and alleged to have committed murder of one Shabir Ahmad Sheikh

S/o Gh. Ahmad Sheikh R/o Maisuma in identical circumstances.

2. The petitioners were declared juveniles and the trial stands commenced before the juvenile Court--Chief Judicial Magistrate, Srinagar. The Trial

Court admitted the petitioners to bail in case FIR No. 35/2009 u/s 302/34 RPC

Police Station Parimpora. However, the petitioners have not been able to get any benefit from the bail granted in their favour as the petitioners continue to be detained in connection with case FIR No. 25/2009 u/s

302/34 Police Station Parimpora. The petitioners' application for bail in case FIR No. 25/2009, has been rejected by learned Chief Judicial

Magistrate vide order dated 31.05.2011 and petitioners directed to be kept in Judicial custody at Central Jail, Srinagar with a direction to

superintendent Central Jail to make special arrangements for the petitioners as, according to learned Magistrate, there was no juvenile home at

Srinagar.

3. The order of Chief Judicial Magistrate, dated 31.05.2001 was assailed in appeal u/s 37 J&K Juvenile Act before learned Additional Sessions

Judge, Srinagar. Learned Appellate Court declined bail to the petitioners. However, Judicial custody of the petitioners at Central Jail Srinagar was

been approved by the Appellate Court and instead the petitioners were directed to be kept at newly set up Juvenile home at Harwan. The Chief

Judicial Magistrate has been asked to visit the juvenile home at Harwan within 15 days to ascertain the facilities available.

4. The order of the Appellate Court dated 23rd August 2011 is questioned in the instant revision petition on the grounds that the order is illegal,

bad in law and has resulted in miscarriage of justice. It is pleaded that the order impugned is based on surmises and conjectures without any

material to sustain the assumptions and presumptions made in the order. The Trial Court is stated to have been influenced by the gravity and

seriousness of the alleged offence and failed to realize that the accused were presumed to be innocent and moreover because of their age entitled

to the benefit available to a juvenile under Juvenile Justice Act. It is contended that there was no material before the appellate court or even the

Trial Court to presume that the petitioners in the event of bail were to come in contact with criminal elements or exposed to any moral danger or

that their release would not be in the interest of the society. The Trial Court and the Appellate Court are also stated to have failed to notice that

maximum period for which the petitioners if found guilty, could be placed in custody was almost over and that in any event, bail was likely to help

the petitioners to get enrolled in the school, restart their studies and undergo the

process of reformation. The petitioners on the strength of

averments made seek reversal of the order of the appellate court and their enlargement on bail.

5. Heard and considered.

6. The criminal liability has its edifice on mens rea or criminal intention. Having regard to the conceptual frame work of criminal liability, the law

makers have classified the offenders on the basis of their mental capacity. Since age has a direct nexus with mental capacity, age is used as a basis

to make the classification. In terms of Section 82 RPC an offender of tender age unaware of consequences of his act, is to be presumed not to

have intended the act or to have knowledge of the consequences of his act, and is thus not to be visited with any penal consequences for his act,

which may otherwise constitute an offence. It lays down that nothing is an offence which is done by a child under 7 years of age. In terms of

Section 82 RPC a child under 7 years of age, notwithstanding the gravity of the offence, its fall out for the society and mode and manner in which it

is committed, is not to be fastened with any criminal liability or even asked to stand trial.

7. With advent of 20th Century, a consensus emerged amongst the criminologists and the social planners that the child who has crossed age of 7

years but is below 16 years even if not presumed to be unaware of consequences of his act, is not expected to have requisite mental capacity to

intend an act or be aware of result of his commissions and omissions as in case of adult and that it would not appropriate to attribute intention and

mens rea to such a child. There was an agreement that delinquency of a child was not to be treated at par with that of an adult offender. The

campaign initiated by all those interested in reclaiming a juvenile offender for the society concretized into Childrens Act 1970. It was significant

legislative effort to treat a child below 16 years of age differently from an adult offender and not to expose such a child to same penal

consequences as an adult offender.

8. Soon it was realized that the children Act 1970 though an important step in the right direction, did not adequately address the problem. The

legislature alive to its constitutional obligation under article 39 clause (f) Constitution of India and International Treaties and covenants like

Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the administration of Juvenile Justice, commonly

known as "Peking declaration" replaced the Children Act 1970 with Juvenile Justice Act 1997. The common thread that runs through left and

warp of the Juvenile Justice Act, 1997 is 'welfare of the juvenile and an endeavour to reclaim a juvenile in conflict with law, for the society. The Act

provides for setting up of juvenile welfare Boards, juvenile Courts, juvenile homes, special homes, observation homes and an aftercare

organization. Sections 15 & 17 empower the Board to send a neglected juvenile or an uncontrollable juvenile to a juvenile home until he ceases to

be a juvenile. Likewise the juvenile Board or Court in terms of Section 18 is required to send a delinquent juvenile, not enlarged on bail to an

observation home. Section 12 makes provision for aftercare of a neglected, uncontrollable or delinquent juvenile after he leaves the Juvenile home,

so as to enable him to lead an honest, industrious and useful life. Section 18 makes obligatory for a Juvenile Court to grant bail to the delinquent

juvenile unless his case falls within the exceptions laid down therein. In terms of Section 21 of the Act even when on an enquiry, the Juvenile Court

is satisfied that a juvenile has committed an offence such Court is not to award sentence but to allow the juvenile to go home after advice or

admonition or release on probation of good conduct and place him after his release under the care of any Institution for his good behaviour and

well being for a period of three years or direct him to be sent to a special home. Section 22 expressly prohibits sentencing a juvenile to death or

imprisonment or committed to prison in default of payment of fine or in default of furnishing security unless the case falls within the proviso to

Section 22 (1) in which case the juvenile is to be kept in safe custody. The delinquent juvenile in terms of Section 24 cannot be tried with an adult

accused in a joint trial. In case juvenile is found by the Juvenile Court to have committed an offence, such finding as laid down in Section 25 is not

to result in disqualification, if any, attached to a conviction of an offence under law. The Superior Courts over the time alive to the spirit and

essence of Juvenile Justice Legislation, have asked for a change in the mindset on part of Juvenile Courts and other Institutions saddled with the

responsibility to implement and enforce the Juvenile Justice legislation.

9. The Supreme Court in *Umesh Chandra Vs. State of Rajasthan*, commenting upon rationale and philosophy behind a separate Juvenile justice

legislation observed that the "Children Act was enacted to protect children from the consequences of their criminal acts on the footing that their

mind and at that age could not be said to be mature for imputing *metis rea* as in the case of adult." The Supreme Court in *Hari Ram Vs. State of*

Rajasthan and Another, lamenting upon failure of all those involved in implementation of the Juvenile Justice Act and asking the key actors to usher

a change in their attitude held:

The said law which was enacted to deal with the offences committed by juveniles, in a manner which was meant to be different from the law

applicable to the adults, is yet to be fully appreciated by those who have been entrusted with the responsibility of enforcing the same, possibly on

account of their inability to understate a system, which while having the trappings of the general criminal law, is however, different therefrom.

10. In *Bhola Bhagat Vs. State of Bihar*, , the Apex Court warned that the technicalities should not be allowed to defeat the benefit of a socially

oriented legislation like Juvenile Justice Act. The Constitution Bench of Supreme court in *Pratap Singh Vs. State of Jharkhand and Another*,

emphasizing the need to implement in letter and spirit the provisions of Juvenile Justice Act observed:

We expect the High Courts and Subordinate Courts to deal with such cases with more sensitivity as otherwise the object of the Act would be

frustrated.

The Court commenting the object of the act, held:

the whole object of the said Act is to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent

juveniles-The Acts being benevolent legislations, an interpretation must be given which would advance the cause of the legislation i.e. to give benefit

to the Juveniles.

11. What emerges from the above brief survey of the Act and case law on the subject is that the provisions of Juvenile Justice Act, which is an

endeavour to protect basic human rights of the children, should be implemented with a liberal and pro juvenile mind set." The Juvenile Court has to

be alive to the object of the Juvenile Justice Legislation, while dealing with any

matter, concerning a juvenile and make use of purposive

interpretation as a tool to advance the cause of such legislation and in the process the cause of justice. What is expected way required is an

attitudinal shift on part of Juvenile Board and Juvenile Courts and other actors envisioned under the Act.

12. When any person accused of a bailable or non-bailable offence and apparently a juvenile, is arrested or detained or appears or is brought

before the Juvenile Court, the Court in terms of Section 18, J&K Juvenile Justice Act, 1997 is under statutory duty to release such person on bail

with or without surety. The duty is cast notwithstanding anything contained in the Code of Criminal Procedure, Samvat 1989. It follows that bail is

to be granted to the accused, who appears to be Juvenile, irrespective of gravity or seriousness of the offence alleged and unmindful of the

prohibition embodied u/s 497 Cr.PC against bail where the offence carries punishment of death or life imprisonment. Section 18, J&K Juvenile

Justice Act, 1997 itself carves out exceptions where the Juvenile Court may not release the accused, apparently a juvenile on bail. The bail may be

denied to such an accused.

i) If there appear reasonable grounds for believing that the release is likely to bring the juvenile accused into association with any known criminal,

ii) When the release is likely to expose the juvenile to moral danger or

iii) When the release would defeat the ends of justice.

13. A closer look at Section 18 of the Act reveals that thrust is on welfare of the juvenile and not on gravity or seriousness of the offence or the

mode and manner in which the offence has been committed. In other words, whether the juvenile accused is admitted to bail or denied bail, the

deciding factor in both cases is only and only the welfare of the juvenile. However, a Juvenile Court has to keep in mind that in case of a juvenile

accused as against an adult accused, bail is the rule even in an offence carrying life imprisonment or death sentence and denial of bail is only an

exception. The Juvenile Court is not to allow itself to be swayed by gravity or seriousness of the offence, the punishment carried by the offence or

the manner in which the offence is alleged to have been committed but to be alive to the welfare of the juvenile. It is seen that as the Juvenile Court

invariably is also a regular Criminal Court designated as Juvenile Court for a

particular area, the presiding officer of the Juvenile Court continues to have hang over of presiding over criminal trial against an adult accused, even when it presides over a Juvenile Court. It is for said reason that when we go through the proceedings of a Juvenile Court, we find adjective like ""gruesome"", ""serious"" ""grave"" etc. when reference is made to the offence alleged against the juvenile accused. The presiding of the Juvenile Court and all others having a role in implementation of the Juvenile Justice Act have to come out of a mindset of ""fixed notions"" and ""tunnel vision"" and realize that an accused before the Court is a child of less than sixteen years to be treated differently than an adult accused. The law makers, it is to be realized, have in their wisdom decided not to attribute criminal intention, where an offence is committed by a juvenile, in the manner it is attributed to an adult accused and, thus, to treat a juvenile offender leniently so that he is reclaimed for society and helped to be a responsible citizen.

14. In the present case, the Chief Judicial Magistrate presiding over the Juvenile Court as also the Appellate Court unfortunately have not been alive to the spirit and mandate of Juvenile Justice Act while dealing with petitioners' application for enlargement on bail and thereafter, appeal against the order rejecting bail. Contrary to mandate of Section 18 of the Juvenile Justice Act, Trial Court as well as Appellate court have been influenced by gravity or seriousness of the offence alleged against the petitioners and the alleged manner of commission of the offence.

15. Both the Trial Court and Appellate Court have been at pains to point out the alarm in the society that must have been raised by the alleged offence. It is emphasized that the offences alleged against the petitioners must have sent shock waves to one and all. The gravity and seriousness of the offence alleged against the petitioners and the alleged manner in which the offences were committed are predominant theme of the orders passed by the Courts below. In the process the real enquiry, the Court was to make in terms of Section 18 to decide whether the petitioners were to be admitted to bail, has been sidelined and pushed to the back seat. The Trial Court as well as the Appellate Court was required to examine whether there were reasonable grounds for believing that the petitioners release was likely to bring them into association with ""known criminal"" or expose them to ""moral danger"" or whether there release would defeat the

"ends of justice". The expression "known criminal" used in section 18 makes it amply-clear that requirement of section 18 would not be satisfied by mere recital or reproduction of the conditions spelt out in the provision, in which bail may be declined. In order to refuse bail, the Juvenile Court must have material before it that when looked into objectively leads to the conclusion that release of a juvenile delinquent, was likely to bring him into association with any "known criminal" or expose him to moral danger" or his release would defeat the "ends of justice". In the present case there was no material at all available to the Trial Court and thereafter the Appellate Court to record satisfaction that the petitioners release was likely to bring them into association with any "known criminal or expose them to "moral danger" or their release would defeat the "ends of justice" obviously they could not make any discussion of the material, not brought on the file. In Sanjay Chaurasia v. State of U.P. and another 2006 (5) SCC 480 the Supreme Court has held that there must be some reasonable grounds to be urged and brought before the Court by the prosecution for believing that the case falls within one of the exceptions laid down in Section 18 of the Act and where such grounds are not brought before the Court, the Juvenile Court or the Appellate Court cannot work on assumptions to rush to the conclusions. The Court observed:-

the Appellate Court dismissed the appeal only on the presumptions that due to commission of this offence, the father and other relatives of other kidnapped boy had developed enmity with the revisionist, that is why in case of his release, the physical and mental life of the revisionist will be in danger and his release would defeat the ends of justice but substantial to this presumption, no material has been brought before the Appellate Court and the same has not been discussed and only on the basis of presumption, Juvenile Justice Board has refused the bail of the revisionists which is in the present case is unjustified and against the spirit of the Act". The law laid down was referred to and relied upon in Ankit Upadhyaya v. State of U.P. and another 2006 (55) All CC 759 and Anil Kumar v. State of U.P. 2007 STPL (LE-Crim) 26425.

16. The above discussion apart, the Trial Court and the Appellate Court have lost sight of other important aspects of the matter, while dealing with the bail applications. The Courts have failed to notice that the petitioners were

admitted to bail in case FIR No. 35/2009 u/s 302/34 RPC and

Court while enlarging the petitioners on bail, was not informed that the petitioners in the event of their release were likely to come into contact with

any "know criminal" for that any other exception laid down in Section 18 was attracted. It appears that the Trial Court and Appellate Court also

failed to appreciate that the petitioners were in custody for more than two years and that even if they were held guilty, the maximum period for

which their natural guardian can be bound down for the juvenile, send to a special home for kept under supervision of probation officer in terms of

Section 21 and 23, was three years and the prescribed period having almost come to an end without finding of guilty returned by the Court, the

petitioners deserved to be released on bail. The Appellate Court as also lost sight of the fact that Director Social Welfare Department vide order

No. DSWK/SCH/2011/19212-13 dated 18th August, 2011 informed the Appellate Court that it was likely to take sometime to make juvenile

home functional. In the said background when the Appellate Court was not definite about the facilities available at the juvenile home, Harwan as is

evident from the direction Chief Judicial Magistrate to inspect the home so as to find out whether requisite facilities were available and also inputs

given by Director Social Welfare on the subject, there was no reason to send the petitioner to the juvenile home as the intended purpose was not

to be achieved by such exercise.

17. For the reasons discussed above, the order of the Trial Court as also of the Appellate Court suffer from serious illegality and call for

interference u/s 435 Cr. P. C. Resultantly the revision is allowed and the order impugned set aside. The petitioners be released on bail subject to

following conditions:-

1. That the natural guardian of each of the petitioner furnish a personal bond in the amount of Rs. 50,000/- with two sureties, preferably duly

elected Panchs and Sirpanchs or other respective personals of the locality in the identical amount to the satisfaction of Registrar Judicial High Court

Wing, Srinagar.

2. That natural guardian of each of the petitioners and two sureties furnished, undertake that they keep the petitioners under their supervision and

not allow them to come in contact with any "know criminal" and shall take all

steps for their good behaviour and well being.

3. That the natural guardian of each of the petitioner and two sureties furnished further undertake that they shall take steps to get the petitioners

enrolled in School, preferably with moral education and ethics as components of its curriculum and report compliance to the Juvenile Court.

4. That the natural guardian of each of the petitioner and two sureties, undertake to produce the petitioners before the Juvenile Court on each and

every day, the matter comes up for hearings.