
(2008) 05 P&H CK 0170

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 667-DB of 2004

Updesh and others

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 09-05-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 2, 20
Penal Code, 1860 (IPC) — Section 302, 34, 364A, 365, 404

Citation : (2008) 3 RCR(Criminal) 676

Hon'ble Judges : Jora Singh, J;J.S. Khehar, J

Bench : Division Bench

Advocate : N.K Sanghi, for the Appellant; Ravi Dutt Sharma, D.A.G., Haryana, for the Respondent

Judgement

Jora Singh, J.—Updesh son of Mahender Singh, Gurjeet alias Sonu son of Randhir Singh and Vinod alias Kala son of Raj Singh have directed this appeal against the judgment dated 17.7.2004 in Sessions Case No. 159 of 2002 bearing First Information Report No. 120 dated 2.7.2001 registered under Sections 365, 302, 404/34 IPC at Police Station, Murthal.

2. On 2.7.2001, Naresh Kumar wrote letter to SHO, Police Station Murthal that on 1.7.2001, at about 2:00 P.M, his son Aakash aged about six years had gone outside to ply bicycle. Munish, the friend of Aakash, who was residing in their neighbourhood was also with him. Aakash and Munish used to ply bicycles together. Aakash failed to return to his house up to 5:00 P.M. They thought that boys are playing outside. Thereafter, enquiry was made from the house of Munish, who was also found missing from his house. An effort was made to locate Aakash and Munish. On the same day, in the evening, a message was received on telephone No.82619 from Randhir resident of Sonapat. Randhir directed them to go to Qumaspur road on 8:00 P.M where a red colour cloth would be seen. Randhir did not demand any ransom. Telephone was disconnected when his identity was enquired. Aakash and Munish were abducted

by some unknown persons.

On receipt of the application, FIR No. 120 dated 2.7.2001 under Sections 365, 302, 404/34 IPC was got registered.

3. Accused had made extra judicial confession before Devi Singh lamberdar that crime was committed by them. At the instance of Devi Singh, accused were arrested.

After the completion of the investigation, the accused were challaned.

Vide order dated 15.3.2002 passed by Judicial Magistrate First Class, Sonapat, the case was committed to the Court of Session for trial.

4. After hearing Public Prosecutor for the State and defence counsel for the accused, learned Additional Sessions Judge, Sonapat found that a prima facie case under Sections 364-A, 302/34 IPC was made out against the accused. Accused were charged accordingly, to which they pleaded not guilty and claimed trial.

In order to substantiate the charges, prosecution examined as many as 22 witnesses and tendered documents.

5. PW-2 Naresh Kumar stated that on 1.7.2001, at about 2:00 P.M, his son Aakash had gone outside from his house to ply bicycle with his friend Munish. Aakash failed to return. Enquiry was made from the house of Munish, but Munish was also found missing from his house. One room in the house of Naresh Kumar, father of Aakash was let out to Sunil, wherein a telephone has been installed. On the same day at about 6:00 P.M, on that telephone, a call was received that he should come on the Qumaspur road at 8.00P.M, where a red cloth is to be noticed. On telephone, the caller did not disclose his identity except that his name was Randhir Singh resident of Sonapat. On realizing that Aakash might have been kidnapped by the person who made a telephonic call, complaint Ex.PD was made to the police. On 3.7.2001, dead body of Munish was found in the fields of Ram Mehar and on 4.7.2001, dead body of Aakash was found in the fields of Ramesh Kumar. On 11.7.2001, accused were in the custody of police and wrist watch and other belongings of the deceased were got recovered. Police party was led to the place of occurrence where Aakash and Munish were murdered.

6. Anita, PW-8, wife of the complainant supported the version of complainant by saying that Aakash and Munish used to ply bicycles together. On 1.7.2001 at about 2:00 P.M, her son Aakash had gone with Munish outside the house to ply bicycle, but failed to return. In the evening a telephonic message was received from Randhir, resident of Sonapat and the complainant was directed to visit Qumaspur Road. On asking about the identity of the caller, the telephone was disconnected. No ransom was demanded.

Om Pati, mother of Munish, deceased appeared as PW-14 and made a similar

statement.

PW-1, Devi Singh, Lamberdar stated that on 11.7.2001, Updesh, Vinod and Gurjeet came to him and made extra judicial confession that Aakash and Munish were murdered by them. They further requested him to save them from the police. Thereafter, accused were produced before the police. They were interrogated and on interrogation they suffered disclosure statements.

Raj Bir, PW-15 had noticed the dead body of Munish son of Bhim Singh in the fields on 3.7.2001. A cycle was also found lying near the dead body.

PW-3, Mai Chand stated that on 5.7.2001, moulds of foot prints were lifted.

PW-13, Head Constable, Ishwar Singh got conducted post mortem examination.

PW-4, Dr. Adarsh Sharma had conducted post-mortem examination on the dead body of Aakash.

PW-7, Dr. Arun Garg conducted post-mortem examination on the dead body of Munish.

PW-17, ASI, Satbir Singh is the Investigating Officer.

PW-18, Suresh Kumar stated that on 14.7.2001, moulds of the bare foot of Updesh, Gurjeet and Vinod were taken in his presence.

7. PW-19, ASI, Dharam Pal had recorded FIR Ex PD/1 on receipt of the complaint Ex.PD. He further stated that on 3.7.2001, he was with the party of SI, Satbir Singh. A cycle of the Atlas make was taken to police possession vide memo Ex.PX.

PW-21, Ram Kalan, Inspector stated that on 4.7.2001, he had gone to village Murthal in connection with the investigation of this case. Dead body of Aakash was found lying in the fields of Ramesh Kumar. A rough site plan and an inquest report was prepared. Moulds of foot-prints were also lifted from the spot. On 11.7.2001, Devi Singh had produced the accused before the police. Accused were interrogated. Accused suffered disclosure statements. As per disclosure statements, recovery of different articles were got effected. Statements of the remaining witnesses are of formal nature.

8. After the close of the prosecution evidence, statements of the accused were recorded u/s 313 Cr.P.C. to explain the allegations levelled against the accused. Accused denied all the allegations of the prosecution and appeared to be innocent.

9. Defence version of the accused was that they were falsely implicated. On 8.7.2001, Om Parkash Chautala, Chief Minister, Haryana had visited village Murthal. The news regarding the alleged occurrence was published in all the newspapers. On 9.7.2001, accused were taken to Rohtak. Their finger prints were forcibly obtained on a small bicycle to create false evidence.

In defence, accused examined DW-1, Rajinder Mehra. Learned counsel for the appellant-accused argued that date of occurrence is 1.7.2001. At the time of commission of crime, appellants-accused were juvenile. Benefit of juvenility under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as 'the Act') should be given. Impugned judgment is not contested on merit.

10. Learned counsel for the State argued that appellants-accused were convicted vide the impugned judgement dated 17.7.2004. Contention of the appellants-accused that they were juvenile was rejected by the trial Court. Appellants-accused had also approached the Hon"ble High Court. But, contention of the appellants-accused was not accepted. No further appeal/revision was filed before the Hon"ble Supreme court. Therefore, at this stage, defence counsel for the appellants-accused cannot argue that Appellants-accused are juvenile and as per the Act they are to get benefit.

Updesh, Appellant-accused moved an application to the effect that he is juvenile. His date of birth is 25.12.1985. But the request of Updesh was rejected vide order dated 10.4.2004.

11. Gurjeet and Vinod also requested that they are juvenile. But request of Gurjeet and Vinod was also rejected vide order dated 4.5.2002. Trial Court opined that they are not juvenile. Now simple question at this stage to be considered is whether the appellate Court can opine that the appellants- accused are juvenile or not as per the Act.

Section 20 of the Act is reproduced 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 the Act as if it has 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 materiel times when the

alleged offence was committed.

12. In view of the Section 20 of the Act, appellate Court can opine whether the appellants-accused are juvenile or not when dispute is regarding age of the accused as to whether they were juvenile at the time of the commission of the crime.

13. Allegation of Updesh is that his date of birth is 25.12.1985. In support of this allegation, Updesh produced three witnesses namely, Raj Kumar, Mahender Singh and Balram. Ex.A-1 is the certificate issued by the Registrar of Deaths and Births. As per certificate, date of Birth of Updesh is 25.12.1985. On the other hand, no documentary proof regarding the age of the accused was put forward by the State, except a form alleged to be filled by the father of Updesh. As per contents of the form, date of birth of Updesh is 22.2.1982.

Date of birth of Vinod as per Middle and Matriculation certificate is 18.9.1985. Ossification test was also conducted. As per report by the doctor, Vinod is 16 years old.

14. The contention of Gurjeet Singh appellant-accused is to the effect that his date of birth is 5.10.1984. In support of this contention, certificate Ex. A-1 and A-2 were produced. Ex. A-1 is the school leaving certificate issued by Senior Secondary School, Murthal (Sonapat). According to this certificate, date of birth of Gurjeet son of Randhir Singh is 5.10.1984. Father of Gurjeet also appeared in the Court. No proof from the side of respondent-State. In *Ram Janam v. State of U.P* and another, 2003 (4) RCR (Cri) 592 (Allahabad), school leaving certificate and medical examination report read together showing that accused is juvenile. Accused declared to be juvenile. Determination of age on the basis of voters list is not proper, because voters list is not prepared on proper enquiry. In *Rajinder Chandra v. State of Chhattisgarh*, 2002 (1) RCR(Cri) 586 (SC), Hon"ble Supreme Court held the claim of the accused that he was juvenile. Birth certificate, school record and ossification test showed that age of accused was just on border of 16 years when offence was committed. Benefit should go to accused. While dealing with question of determination of the age of the accused for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the Court should lean in favour of holding the accused to be juvenile in borderline cases.

15. As per the certificate issued by the Registrar of Deaths and Births, date of birth of Updesh is 25.12.1985. Date of birth of Vinod as per middle and matriculation certificates is 18.9.1985. Date of birth of Gurjeet as per school leaving certificate is 5.10.1984. No documentary proof from the opposite side.

16. Ossification test was also done on the request of the accused and as per the order of the Court. As per the test, age of Gurjeet was 15-1/2-16-1/2 years, whereas the age of vinod was 17-18 years. Learned trial Court rejected the

contention of the appellant-accused Updesh in view of the form filled by the father of Updesh. Certificate issued by the Registrar of Deaths and Births was ignored. In case of Vinod, Middle and Matriculation certificate were ignored because as per the voter list, Vinod was 19 years before 1.1.2002.

17. Request of Gurjeet was ignored in view of the voter list. Ossification test was also ignored on the allegation that test is not conclusive proof. Age can vary two years on either side. But, as per documentary proof, appellant- accused were less than 18 years at the time of commission of crime.

18. After request of the appellant-accused to declare them juvenile was rejected, Gurjeet had approached the Hon"ble High Court. Vide order dated 6.8.2002 passed by the Hon"ble High Court, Juvenile Justice Board was directed to hold enquiry as to whether appellants-accused is juvenile or not.

19. Vinod had also challenged the order dated 4.5.2002, but revision was dismissed. Plea of the State was that as per the voter list, accused is 19 years old. Although, as per ossification test, age of the accused is 17-18 years. In *Amresh Tiwari v. Lalta Prasad Dubey and another*, 2002 (2) RCR(Cri) 614 (SC), Hon"ble Supreme Court held that interim orders even though they may have been confirmed by higher Courts, never bind and not prevent passing of contrary order at the stage of final hearing.

20. No doubt request of the appellants to declare them juvenile was not accepted by the Hon"ble High Court while disposing of different revisions, but as per Section 20 of the Juvenile Act, appellate Court has power to opine whether the appellants are juvenile or not. Benefit of juvenility is to be given to all the accused who were below the age of 18 years. Therefore, no dispute that the appellant-accused were not less than 18 years of age on the date of occurrence dated 1.7.2001, Section 20 of the Act is fully applicable. Contention of the learned counsel for the appellant-accused deserves to be accepted.

Impugned judgement is upheld on the point of conviction but is set aside on the order of sentence.

On the question of sentence, appellants are relegated to the Juvenile Justice Board, Sonapat. Appellants in custody are to be produced before Juvenile Justice Board, Sonapat on 30.5.2008.

The appellants-accused are in custody. They have already undergone the maximum period of sentence which can be awarded under the Act. Therefore, they are ordered to be released on bail to the satisfaction of CJM, Sonapat.

Copy of the order be given to the Juvenile Justice Board, Sonapat forthwith by the Registry of this Court.