

(2022) 03 MP CK 0154

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 2108 Of 2021

Vidhi Ka Ulaghan Karne Wala Balak

APPELLANT

Vs

State Of M.P. & Anr

RESPONDENT

Date of Decision : 03-03-2022

Acts Referred:

Constitution Of India, 1950 — Article 21
Juvenile Justice (Care And Protection Of Children) Model Rules, 2016 — Rule 8
Juvenile Justice (Care And Protection Of Children) Act, 2015 — Section 1(4), 3, 3(xii), 3(xiii), 12, 15, 23, 102
Code Of Criminal Procedure, 1973 — Section 5, 436A
Indian Penal Code, 1860 — Section 376
Protection Of Children From Sexual Offences Act, 2012 — Section 5, 6
Juvenile Justice Act, 2000 — Section 1(4)

Citation : (2022) 03 MP CK 0154

Hon'ble Judges : Anand Pathak, J

Bench : Single Bench

Advocate : Deependra Singh Kushwah, Kalpana Parmar, Vijay Dutt Sharma, Sanjay Kumar Sharma

Final Decision : Dismissed

Judgement

Anand Pathak, J

1. Present petition is a criminal revision under Section 102 of Juvenile Justice (Care and Protection of Children) Act, 2015 (for brevity "the Act of 2015") filed by the petitioner/Child in Conflict with Law, against the order dated 14.10.2020 passed by VIth Additional Sessions Judge (Special Judge), Bhind District Bhind in Criminal Appeal No. 76/2020, whereby appeal preferred by the petitioner has been dismissed and order passed by Juvenile Justice Board, Morena has been affirmed.

2. In the case in hand, it appears from the pleadings and submissions that Child in Conflict with Law (CICL) is in correction/remand home since 26.02.2020 and is facing proceedings before Juvenile Justice Board for alleged offence under

Section 376 of IPC and Section 5/6 of Protection of Children from Sexual Offences Act. (hereinafter shall be referred to as "POCSO Act").

3. Learned counsel for the petitioner prays for release of CICL on the ground of period of retention in remand/correction home, and raised the legal question that as per Provision of Section 436-A of Cr.P.C. petitioner suffered more than two years of incarceration, therefore, he ought to be released on bail because maximum retention/detention for CICL in remand home can be three years and since the petitioner has completed more than half of the period of detention, therefore, his case be considered for bail.

4. For assistance of this Court, Shri Vijay Dutt Sharma, learned counsel and Shri Sanjay Kumar Sharma, learned Govt. Advocate, who were present in the Court room were appointed as Amici Curiae and vide order dated 09.09.2021 following questions were framed.

"1. Whether a child in conflict with law completes more than one half of total period of retention of three years in special home, then whether he is entitled to avail the benefit of Section 436-A of Cr.P.C.?

2. Whether a child in conflict with law can be treated as under trial prisoner as contemplated under Section 436-A of Cr.P.C.?

3. Any additional submission related to this question can also be addressed by the learned amici curiae in the matter."

5. Counsel for the parties delivered their arguments in extenso.

6. It is the submission of learned counsel for the petitioner that since the Act of 2015 is a beneficial and benevolent legislation, therefore, is to be construed as incorporated the provisions impliedly, which furthers the cause of the Act of 2015. Application under Section 436-A of Cr.P.C. is one such clause which offers the welfare of CICL and it helps to achieve general objective of the Act of 2015 which does not exclude Cr.P.C. in expressed terms. Therefore, relevant provision like Section 436-A of Cr.P.C. can be borrowed here for the benefit of CICL.

7. Shri Vijay Dutt Sharma, learned Amicus Curiae through his synopsis and arguments submits that Section 1(4) of the Act, 2015 clearly gives all pervasive power to the Act of 2015 in all the matters in relation to children and overrides any other law for the time being in force, including the Code of Criminal Procedure, 1973, which is very well saved by the savings clause as contained under Section 5 of Cr.P.C.

8. According to him, the Code itself has saved the applicability of the special law, subject to the absence of a specific provision to the contrary. While relying upon the interpretation given by the Apex Court in respect of expression "specific provision to the contrary" in the case of Maru Ram Vs. Union of India & Ors. (1981) 1 SCC 107 and while relying legal maxim "generalalia specialibus non derogant", it is submitted that the Act of 2015 shall prevail over Cr.P.C.

9. Shri Sharma further relied upon judgment referred by Division Bench of this Court in case of Ankesh Gurjar @ Ankit Gurjar Vs. The State of M.P., 2021 (1) MPLJ (Cri) 403, passed on 20.01.2021 and submits that Division Bench of this Court has concluded that Section 12 of the Act of 2015 is a complete code in itself qua the subject of bail and, therefore, it appears that general provisions as to Bail and Bond as referred in Section 436-A of Cr.P.C. has no applicability in relation to the bail of Juvenile. Thus, according to him, Section 436-A of Cr.P.C. 1973 cannot be attracted in any case, relating to Juveniles.

10. He also addressed over the point that the Act of 2015 is beneficial legislation, specifically meant to deal with all the matters relating to Children and vide Section 3 of the Act of 2015, the legislature had intended to provide certain principles which are to be followed while implementing the provisions of the Act of 2015. It is submitted that a conjoint reading of Section 3(xii) with Section 12 coupled with Rule-8 of the 2016 Rule of the Act of 2015, provides that apprehension/detention of the child is an exception and should be a matter of last resort, that too by recording reasons for doing the same. Therefore, purview of Code of Criminal Procedure has been taken away from the Act of 2015. Therefore, implicitly also the child who is assessed to be tried as an adult, is neither jointly tried with the adult co-accused persons as per Section 23 of the Act of 2015, nor is tried by the regular courts of law. Child has to be provided child friendly atmosphere and, therefore, a special as well as dedicated Children's Court is established for their trial. He relied upon the judgment of Apex Court in the case of Shilpa Mittal Vs. State of NCT of Delhi & Anr., (2020) 2 SCC 787, in this regard and the subsequent amendment in the Act of 2015 by Parliament. His submission is that Special Act can only be regulated through the provisions contained into the Act.

11. Shri Sanjay Kumar Sharma, learned counsel as Amicus curiae has a different point of view. It is his submission that historical background in which provision as enshrined under Section 436-A of Cr.P.C. finds its genesis from the judgment passed by the Apex Court in the case of Hussain Ara Khatoon & Ors. Vs. Home Secretary, State of Bihar reported in AIR 1979 SC 1369. Judgment emphasized the mandate that the accused who are incarcerated for more than half of terms for which they may be sentenced, must be released forthwith.

12. After due research of law Commission of India, incorporation of such provision by way of under Section 436-A of Cr.P.C. was suggested and later on included, for which it came into force by way of Code of Criminal Procedure (amendment) Act, 2005, whereas, Juvenile Justice (Care and Protection of Children) Act, 2000 (Predecessor of Act of 2015) is prior in time. Therefore, non obstante clause of Section 1(4) of the Juvenile Justice Act, 2000 (predecessor of the Act of 2015) did not have any occasion to consider Section 436-A of Cr.P.C.

13. Since the very concept originates from different judgments of Apex Court and based on Article 21 of the Constitution of India, therefore, bar, if any, under Section 1(4) of Juvenile Justice Act, 2015 impliedly exists, even then it cannot

hold good. This is fundamental right of petitioner enshrined in the Constitution. As per the provisions of Act of 2015, certain presumptions have been raised in favour of juvenile in which Presumption of Innocence of juvenile is one of the attributes and same is applicable here. Since remand home also confines and restrains the activities of a juvenile, therefore, in fact his confinement deserves to be addressed as per Section 436-A of Cr.P.C. By relying upon the book Principles of Statutory Interpretation by Justice G.P. Singh, it is hereby submitted that historical facts in which certain law is germinated and developed must be kept in mind while interpreting the provisions of law.

14. He echoed the same voice like the counsel for petitioner and according to him, looking to the period of retention of the petitioner, his case be considered for release on adequate surety.

15. Heard learned counsel for the parties and learned Amici Curiae at length and perused the documents appended thereto.

16. The instant case is a revision preferred by a Child in Conflict with Law (CICL) seeking his release from remand home on the basis of completing more than half of period of retention which ultimately a child would receive when he would be found to be in conflict with law. Petitioner/ CICL is facing allegations for offence under Section 376 of IPC. As per submissions of learned counsel for petitioner, CICL appears to be 14 years of age.

17. Section 1 (4) of Act of 2015 appears to have been incorporated to bring all pervasive nature of application of Act of 2015 in respect of all matters concerning children in need of care and protection and children in conflict with law those matters include all aspects; right from Apprehension and Detention to Social Reintegration. Said section is reiterated for ready reference:-

"1. Short title, extent, commencement and application.-

(1) xxxxxx xxx

(2) xxxxxx xxx

(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including-

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection."

18. Similarly, Section 5 of Cr.P.C. was referred by the Amicus curiae which is reproduced as under:-

"5. Saving. Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in

force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

19. A conjoint reading of Section 1(4) of Act of 2015 as referred above and Section 5 of Code of Criminal Procedure and while going through the various provisions of Act of 2015 and taking aid of the maxim “*generalia specialibus non derogant*” which means “special things derogate from general things”, it appears that if a special provision is made on a certain matter, the matter is excluded from the general provisions, then picture emerges regarding prevalence of Section 1(4) over any other provisions of law.

20. Not only this, it is the settled canon of interpretation that a particular provision which is to be constructed/interpreted shall not be done in isolation, rather it is the entire scheme of the Act which is to be taken into consideration as a whole, which is unequivocally enunciated in the case of *Indore Development Authority Vs. Shaildra (dead) through Lrs. And Ors.*, (2018) 3 SCC 412 and in the case of *Godawat Pan Masala I.P. Ltd. & Anr. Vs. Union of India & Ors.*, (2004) 7 SCC 68; wherein, the Apex Court observed as under:-

“It is an accepted cannon of Constructions of Statutes that a statute must be read as a whole and one provisions of the Act should be construed with reference to other provisions of the same act so as to make a consistent , harmonious enactment of the whole statute. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed, but to the scheme of the entire statute. The attempt must be to eliminate conflict and to harmonise the different parts of the statute for it cannot be assumed that Parliament had given by one hand what it took away by the other. (See in this connection *Commissioner of Income Tax Vs. Hindustant Bulk Carries*, AIR 2002 SC 3491 and *CIT Central, Calcutta Vs. National Taj Traders*, 1980 AIR 5485.

This Court in *O.P.Singla and Anr. Vs. Union of India and Ors.*, 1984 AIR 1595 (para 17) said: “However, it is well recognised that, when a rule of a section is a part of an integral scheme, it should not be considered or construed in isolation. One must have regard to the scheme of the fasciculus of the relevant rules or sections in order to determine the true meaning of any one or more of them. As isolated consideration of a provision leads to the risk of some other inter-related provision becoming otiose or devoid of meaning.”

21. Taking cue from the said precedent, statute has to be seen in toto and a conjoint look of other relevant provisions of statute are to be seen. One such provision is Section 3 of the Act of 2015 in which certain general principles of care and protection of children are being referred. Apparently, these principles constitute aims/objects/spirit of Act of 2015. Said principals deserve reiteration:-

“3. General principles to be followed in administration of Act.-The Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely:—

(i) Principle of presumption of innocence: Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.

(ii) Principle of dignity and worth: All human beings shall be treated with equal dignity and rights.

(iii) Principle of participation: Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child views shall be taken into consideration with due regard to the age and maturity of the child.

(iv) Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

(v) Principle of family responsibility: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.

(vi) Principle of safety: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

(vii) Positive measures: All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

(viii) Principle of non-stigmatising semantics:

Adversarial or accusatory words are not to be used in the processes pertaining to a child.

(ix) Principle of non-waiver of rights: No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

(x) Principle of equality and non-discrimination:

There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.

(xi) Principle of right to privacy and confidentiality: Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.

(xii) Principle of institutionalisation as a measure of last resort: A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

(xiii) Principle of repatriation and restoration: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.

(xiv) Principle of fresh start: All past records of any child under the Juvenile Justice system should be erased except in special circumstances.

(xv) Principle of diversion: Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole.

(xvi) Principles of natural justice: Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act."

22. Conjoint reading of Section 3 (xii) and (xiii) with Section 12 as well as Rule 8 of the Juvenile Justice (Care and Protection of children) Model Rules, 2016 reveals that apprehension / detention of the child is an exception and in fact except where heinous offence is alleged to have been committed by the child or committed jointly with adults, no FIR shall be registered and in that condition logical inference is that registration of FIR, investigation, filing of charge-sheet and trial as contemplated in Cr.P.C. appear to be ousted prima facie, although at some places some minor overlapping of expressions exists. One exception appears to be carved out in Section 15 in cases of heinous offence committed by child between 16 to 18 years of age but in that case also, Children's Court shall try CICA. As explained earlier, primary purpose of Act of 2015 is to reform or a repatriate the child in to society and not of deterrence or retributive qua child.

23. For this reason even when the child is assessed to be tried as an adult is not jointly tried with the adult co-accused (Section

23 of the Act of 2015) nor is tried by the regular Courts of law but by Children Courts as per Sections 15 and 19, so that child friendly atmosphere may prevail in that Children's Court.

24. Perusal of Section 1 (4) although gives an impression that apprehension, detention or imprisonment etc. are contemplated by the legislature while enactment, but when it is tested on the anvil of Section 12 of the Act of 2015 vis-a-vis provisions of Cr.P.C., then Division Bench of this Court ironed out the creases in the case of Ankesh Gurjar (supra) and held that concept of arrest / apprehension in a police lock-up / jail as contemplated in Chapter V of Cr.P.C. is not recognized in the Scheme of Act of 2015. Therefore, juvenile is not lodged in any police lock-up and jail, therefore, benefit of anticipatory bail is not available to him in Act of 2015. Very concept of "Apprehension or Arrest" has been negated by the Division Bench of this Court and therefore, as per the legal mandate, Juvenile is never under confinement by way of arrest (pre or post trial)

and when he is not arrested under the Act of 2015, then Section 436-A of Cr.P.C. does not come in to play. Words Investigation, Inquiry or Trial as contemplated in Cr.P.C. are not borrowed in letter and spirit in Act of 2015.

25. Section 436-A of Cr.P.C. contemplates a specific condition, wherein, a person when suffered detention for a period extending up to one half of the maximum period specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties.

26. Said section is reiterated hereinbelow for ready reference;-

"436A. Maximum period for which an undertrial prisoner can be detained.- Where a person has, during the period of investigation, inquiry or trial under the Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation.- In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

27. Although Section 436-A of Cr.P.C. Contemplates maximum period of imprisonment specified for that offence under that law. Here expression, under that law can only mean either Indian Penal Code (because of Section 376 of IPC, Juvenile is facing) or POCSO (Section 5/6 of POCSO Act), not the Act of 2015.

28. On close scrutiny, it appears that Act of 2015 nowhere, contemplates imprisonment for such period which is being posed in the present case. It is an Act for the welfare of children and laid stress over Principles as enumerated in Section 3 of Act of 2015. It is being guided by the said spirit and objects. Said Act nowhere, contemplates imprisonment as a way of punishment or as a way of retribution to the crime allegedly committed by a CICT.

29. When relevant Law itself desist from imprisonment or arrest then the theory of suffering more than half of the maximum period of imprisonment gets frustrated. In short, Section 436-A of Cr.P.C. itself does not support the arguments advanced by petitioner.

30. If the controversy is seen from the vantage point of judgment delivered by

Division Bench of this Court in the case of Ankesh Gurjar (supra) then also it is legally established that CICL can never be arrested or apprehended and therefore, valuable right of anticipatory bail is not even contemplated in the Act of 2015. Thus, provisions of Section 436-A of Cr.P.C. is not applicable in the present set of facts.

31. In cumulative analysis, this Court is of the considered opinion that when the promulgation of the special Act meant to treat children in specific manner, then bringing analogy from other statutes would overlap the remedies and may hamper the very object and spirit of Act of 2015.

32. Shri Sanjay Kumar Sharma raised his arguments on the basis of judgment of Apex Court in the case of Hussain Ara Khatoon (supra) and submitted that this judgment would apply in the present set of facts. He tried to pick up the thread from the principles as enumerated in Section 3, specially Principle of Presumption of Innocence but that principle is universal principle in criminal jurisprudence and on the basis of said presumption only, provisions of Cr.P.C. would not be attracted automatically.

33. According to him, remand home also confines the activities of juvenile, therefore, it is to be considered as confinement as per Section 436-A of Cr.P.C. but that analogy would lead to anomalous condition because when the other provisions of Cr.P.C. are specifically ousted and when principles of Deinstitutionalization and Repatriation are General Principles to be followed in the Act of 2015 and when Community Service / Creative Pursuits are contemplated as reformatory measures, then the confinement of child in remand home cannot be construed just like confinement of under trial in jails / prisons. Therefore, those arguments, although look attractive but lacks merit. Therefore, no benefit can be given to a child in conflict with law as per Section 436-A of Cr.P.C.

34. However, non application of provision of Section 436-A does not mean that Juvenile cannot be repatriated to his family and community at all, but said order can always be made even before such completion of period on individual facts of the case.

31. Coming to the present case, from the case diary, it appears that petition is aged 14 years and is facing allegations of commission of offence of rape of a girl aged 3 years. His arrest memo indicates his age as 14 years and medical report supports allegations of prosecution in specific terms, therefore, case of the petitioner lacks merits at this stage. He may renew his prayer later on.

35. In view of the discussion made about, questions as formulated above deserve to be answered in negative and child in conflict with law can not be treated as under trial prisoner as contemplated under Section 436-A of Cr.P.C. and cannot be released after completing half of total period of detention of three years in special home to avail the benefit of Section 436-A of Cr.P.C.

36. Before parting, this Court records its appreciation for valuable assistance

rendered by learned Amici Curiae Shri Vijay Dutt Sharma and Shri Sanjay Kumar Sharma. Their efforts deserve appreciation.

37. Resultantly, revision petition sans merits and is hereby dismissed. Petitioner may take keen interest in positive and creative pursuits during rehabilitation.