CRM-M-17856-2020

IN THE HIGH COURT OF PUNJAB AND HARYANAAT CHANDIGARH

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2024:PHHC:076452-DB

CRM-M-17856-2020, **CRM-M-20035-2022 (O&M), CRM-M-22624-2022, CRM-M-33852-2022,CRM-M-32924-2022, CRM-M-37707-2022, CRM-M-38111-2022**, **CRM-M-40576-2022, CRM-M-34939-2022,CRM-M-37307-2020**, **CRM-M-42768-2021, CRM-M-46593-2022, CRM-M-51693-2022**, **CRM-M-52782-2022, CRR-170-2023, CRM-M-55784-2022, CRM-M-52039-2022, CRM-M-55545-2022, CRM-M-4128-2023, CRM-M-11605-2023, CRM-M-4964-2023, CRM-M-17501-2023, CRM-M-16360-2023, CRM-M-30322-2023, CRM-M-24715-2023, CRM-M-50136-2023, CRM-M-19031-2023**, **CRM-M-43776-2023, CRM-M-47596-2023,CRM-M-42866-2023, CRM-M-62083-2023, CRM-M-37608-2023, IOIN-CRM-37616-2022 in CRM-37616-2022**

Reserved on: **07.03.2024**
Date of Decision:**29.05.2024**

Jatin .....Petitioner(s)

Versus

State of Punjab ....Respondent(s)

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA
HON'BLE MS. JUSTICE LAPITA BANERJI

Present: Ms. Tanu Bedi, Advocate (Amicus Curiae) with
Mr. Vibhu Agnihotri, Advocate and
Mr. Abhimanyu, Advocate.

Mr. G.S. Sidhu, Advocate,
Mr. Amit Arora, Advocate,
Mr. Rahul Arora, Advocate,
Mr. Ankit Rana, Advocate,
Mr. Sushil Bhardwaj, Advocate,
Mr. Ankur Bansal, Advocate,
Mr. B.S.Mann, Advocate for
Mr. Prabhjayot Singh Chahal, Advocate,
Mr. Abhishek Sahu, Advocate for
Mr. B.S.Bhalla, Advocate,
Mr. Pradeep Virk, Advocate,
For the petitioner(s).

Mr. Pawan Girdhar, Addl. Advocate General, Haryana and

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Mr. Apoorv Garg, Sr. Deputy Advocate General, Haryana.

Mr. A.D.S.Sukhija, Additional Advocate General, Punjab.

G.S.SANDHAWALIA, J.

1. The present judgment shall dispose of 33 petitions while going on to decide the legal issue regarding the maintainability of an application by a juvenile for grant of pre-arrest bail under Section 438 Cr.P.C. since conflicting views have been taken by learned Single Judges of this Court in view of provisions of Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short 'the 2015 Act').

2. The learned Single Judge on 11.08.2020 noted the cleavage of opinion while referring to three judgments which took the larger view and opened the window to the right of the juveniles to agitate and seek pre-arrest bail. The views of the other Courts were also kept in consideration which included the Division Bench judgments of Calcutta High Court and Chhattisgarh High Court, which were to the contrary. Resultantly, the matter was referred to be placed before a Bench of appropriate strength to resolve the issue while extending the interim protection granted earlier to the petitioner whereby, he had been directed to join investigation as and when called upon and was to abide by the conditions as provided under Section 438(2) Cr.P.C. Resultantly, various other cases have also been clubbed by other learned Single Judges to be heard with said reference.

3. The limited factual matrix which is to be noticed is that the petitioner is stated to be 17 years of age having been born on 27.03.2003 as per the birth certificate issued by the Registrar, Births & Deaths, Jalandhar which is further authenticated by the school certificate (Annexure P-2), who was involved in FIR No.13 dated 06.02.2020 registered at P.S. Cantt., District Jalandhar under Sections 323, 324, 427, 451, 148 and 149 IPC lodged by one Sandeep Kumar and Section 307 IPC has been added later on. The Additional Sessions Judge, Jalandhar

dismissed the anticipatory bail application on the ground that the petitioner alongwith others armed with deadly weapons formed the unlawful assembly in prosecution of common/unlawful object and caused the injuries on the person of the complainant which had been declared grievous in nature being on the vital part of the body i.e. head and investigation was still going on and co-accused were yet to be arrested. Recovery of weapons having to be made, therefore, the custodial interrogation of the accused was held to be necessary. Resultantly, the present petition came to be filed before this Court whereby, the interim order was granted on 08.07.2020 while noting the contention of the counsel that the petitioner was not named in the FIR and injuries had been suffered on both sides. The judgment was reserved on 07.08.2020 by the learned single Judge and then referred to a larger Bench on 11.08.2020, as noticed above.

4. We had asked Ms. Tanu Bedi, Advocate to assist this Court as *Amicus Curaie,* who has accordingly argued in favour of the larger picture of the exercise of jurisdiction by the Courts rather than taking the restrictive view on the ground that the petition is not maintainable, as put forth by Mr. Pawan Girdhar, Addl. A.G., Haryana assisted by Mr. Apoorav Garg, Sr. DAG, Haryana. Similarly, Mr. ADS Sukhija, Addl. A.G., Punjab has brought to our notice the relevant provisions.

5. A brief run up of the two different views taken by the various High Courts would be necessary before we take an independent call on the issue and make up our minds as which of the paths to tread being at the cross roads at this point of time.

The Broader View:

6. The Division Bench of Chhattisgarh High Court in ***Sudhir Sharma vs. State of Chattisgarh, (2017) SCC Online Chh 1554*** traced the history of the anticipatory bail and suggestions made by Law Commission of India, the incorporation as such of Section 438 in the Code of Criminal Procedure, 1973 while drawing strength

from the judgment of the Constitution Bench of the Supreme Court in the case of ***Gurbax Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565.*** It was noticed that anticipatory bail is basically release from the custody of the police which directly affects the freedom and the movement of the person and it was an insurance against police custody following upon the arrest for the offence or offences and it provided conditional immunity from the 'touch' or 'confinement'. The judgment of the Apex Court in ***Siddharam Satlingappa Mhetre vs. State of Maharashtra and others , (2011) 1 SCC (Cri.) 514*** was also kept in mind by examining the fact that whether the child in conflict with law (in short 'CICL'), as defined under the 2015 Act, was being deprived of a right to apply for anticipatory bail under Section 438 Cr.P.C., while referring to Articles 39, 45 and 47 of the Constitution of India and keeping in mind the fact that the needs of the children are to be met and their basic human rights are fully protected. It was noticed that the 2015 Act had come into force after the experiment with the Juvenile Justice (Care & Protection of Children) Act, 2000 (in short 'the 2000 Act') while analyzing the provisions of the 2015 Act including Section 12. It was accordingly held that the provisions dealing with the post arrest procedure that may be followed in the case of the CICL, were on account of an apprehension or detention. Sections 22 and 23 of the 2015 Act were referred to regarding the protection given to the children from preventive detention laws and the bar against joint proceedings. The fact that there was no provision, either expressly or impliedly, excluding the applicability of the provisions of Section 438 Cr.P.C. and that the procedure under Cr.P.C. had to be followed while holding any inquiry under the 2015 Act weighed with the Division Bench. It was held that there was no warrant for the conclusion that the *non obstante clause* contained under Section 12 excluded the applicability of the remedy for grant of anticipatory bail. The relevant portion of the judgment in *Sudhir Sharma's case (supra)* reads thus:-

"38. Applying the aforesaid principles applicable in the matter of interpretation of non obstante clause, if the scheme of Act of 2015 in general and the provisions relating to grant of post arrest bail as contained in Section 12 of the Act of 2015 in particular, having non obstante clause to override the provisions of the Code of Criminal Procedure, 1973, generally with the provisions of general applications of section 4 of the Code of Criminal Procedure, 1973, the legislative intention does not appear to altogether exclude provisions of the Code of Criminal Procedure, 1973 in relation to provisions contained in Chapter XXXIII relating to bails and bonds. Provisions relating to bails and bonds contained in the Code of Criminal Procedure, 1973 would be rendered inapplicable only to the extent that they are inconsistent with the provisions of grant of bail contained in the Act of 2015. There is no warrant for conclusion that non obstante clause contained in Section 12 of the Act of 2015 completely excludes the availability of remedy of applying for grant of anticipatory bail by a CICL, who is apprehending his arrest on the accusation of commission of any offence. The only provision for grant of bail as contained under Section 12 of the Act of 2015, which deals with application for grant of bail by a CICL applies, when he is apprehended or detained by the police or appears or brought before the Board on the allegation of having committed a bailable or non-bailable offences. The statutory scheme of Section 12 mandates grant of bail to a CICL by use of word "shall" unless there appears reasonable grounds for believing that the release is likely to bring the CICL in association with known criminal or to expose such person to mental, physical or psychological danger or his release would defeat the ends of justice. The provision, in fact,deals with a case of child differently from any other person who is not a child. Unless the aforesaid three exceptional grounds are made out for rejection of application for grant of bail, CICL has to be granted bail irrespective of nature and gravity of allegations against him.

> *We fail to see how the beneficial provision for grant of bail to CICL could be interpreted to the utter prejudice of a CICL to say that he would not be entitled to say that important statutory scheme of seeking anticipatory bail provided under section 438 of the Code of Criminal Procedure, 1973 is not available to him. On rational construction of the non obstante clause in Section 12, it only seeks to put a CICL in a better position as compared to any other person who is not a CICL by providing that ordinarily a CICL has to be granted bail and it could be rejected upon existence of three specified grounds exhaustively enumerated in the provision itself. There is no justification for giving non obstante of such a wide amplitude as to exclude the statutory remedy of applying for anticipatory bail by a CICL. The Act of 2015 is completely silent with regard to anticipatory bail. Therefore, in view of the provision contained in section 4 of the Code of Criminal Procedure, 1973, the provision relating to grant of anticipatory bail contained in section 438 of the Code of Criminal Procedure, 1973 will continue to have application and will be available to CICL, who is apprehending arrest."*

7. Resultantly, the two judgments of the Madhya Pradesh High Court in ***Kapil Durgawani vs. State of Madhya Pradesh, 2010 (IV) MPJR 155*** and ***Sandeep Singh Tomar vs. State of Madhya Pradesh, 2014 (IV) MPJR 49*** were distinguished that they did not lay down a proposition that CICL does not have remedy for applying for the anticipatory bail. Resultantly, the view of the learned Single Judge in ***M.Cr. C(A) No.1104 of 2014, Preetam Pathak vs. State of Chhattisgarh*** *decided on 17.12.2014*was not approved whereas the view in ***Mohan vs. State of Chhattisgarh, 2005 (1) CGLG 320,*** which was under the 2000 Act, was approved. The relevant portion, vide which question was answered in the judgment rendered in *Sudhir Sharma's case (supra)* reads thus:-

> *"47. In the result, we answer the reference, as below:- "The application for grant of anticipatory bail under section 438 of*

> *the Code of Criminal Procedure, 1973 at the behest of CICL before the High Court or the Court of Sessions is maintainable under the law and the said remedy is not excluded by operation of Section 12 of the Act of 2000 or Section 12 of the Act of 2015."*
>
> *48. This bail application be posted before the appropriate Bench as per roster."*

8. The Division Bench of the Calcutta High Court in ***C.R.M. 405 of 2021, Miss Surabhi Jain (Minor) and others vs. The State of West Bengal*** *decided on 23.08.2021* took a similar view while keeping in mind that several discourses were made at the international level and on stepping in of the United Nations appreciating the holistic approach regarding development, care and protection of the children who were coming in conflict with law under the Juvenile Justice System. The earlier view taken by co-ordinate Bench in ***Krishna Garai and others vs. State , 2016 5CHN 157*** did not deter the Division Bench as such to take a contrary view while keeping in mind that the right of personal liberty is sacrosanct and inviolable by falling back on Article 21 regarding the procedure established by law and the fact that there was no such specific bar under the 2015 Act. The matter was also referred to the larger Bench while disagreeing with the decision of the co-ordinate Bench while granting relief to the juveniles as such to make themselves available before the Juvenile Justice Board.

9. The Aurangabad Division Bench of the Bombay High Court in ***Anticipatory Bail Application No.277 of 2022,Raman and others vs. The State of Maharashtra and others,*** *decided on 15.07.2022* kept in mind the judgment of the learned Single Judge rendered in ***Crl. Misc. App. No.6978 of 2021, Kureshi Irfan Hasambhai vs. State of Gujarat,*** *decided on 09.06.2021,* while coming to the conclusion that concept of arrest was not acceptable under the 2015 Act and kept in mind Article 14 of the Constitution of India alongwith Article 15(3) while referring to the

provisions in detail. It was held that the word 'arrest' was not used in the 2015 Act and the word 'apprehension' having been used would amount to curtailing the liberty of a person. Resultantly, the judgment in *Gurbax Singh Sibbia's (supra)* and ***Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1*** was referred to that a pro-liberty view is to be kept in mind against arbitrary arrests and humiliation. The lack of inconsistency as such between the 2015 Act and the provisions of Section 438 Cr.P.C. were dwelled upon to come to the conclusion that the CICL could not be denied the benefit as such while holding that the due importance to the considerations provided under Section 12 of the 2015 Act is to be kept in mind and would have to be followed. The relevant portion *Raman's case (supra)* read thus:-

> *"30 As is provided under Section 8 (2) of the JJ Act, the High Court and the Children's Court can exercise the same powers, which can be exercised by the Board. These powers can be exercised in appeal, revision or otherwise. The proceedings under Section 438 of the Cr.P.C. are covered under these powers. Because these powers are also available besides proceedings of appeal or revision. Therefore, when deciding the anticipatory bail application, the High Court or the Sessions Court will have to give due importance to the considerations mentioned in the proviso to sub-Section (1) of Section 12 of the JJ Act. However, that proviso does not make the Section 438 of the Cr.P.C. inconsistent with Sections 10 and 12 of the JJ Act. The inconsistency between Cr.P.C. and these two provisions is in respect of Sections 167 and 437 of the Cr.P.C. mainly because the child will have to be produced before the Board and not before any other Court. In those cases, the special procedure provided under Sections 10 and 12 of the JJ Act will have to be followed. But Section 438 of the Cr.P.C. is enacted for a different purpose as discussed earlier and there is no inconsistency.*

> *31. As mentioned earlier, if accusations are made against a child with ill intention to cause humiliation and harassment, then the right to prefer application under Section 438 of the Cr.P.C. should be available to a child. Section 12 of the JJ Act provides for steps to be taken for production before the Juvenile Justice Board after apprehension. There is a possibility that the child can be detained for some period. However, in cases where accusations are false or are made with oblique motive, then it would be travesty of justice to keep the child away from the protection of his parents and from his usual environment and shelter. There is no reason why he should be deprived of such protection even for a single minute. At that stage application under Section 438 of the Cr.P.C. is the effective remedy available to such child.*
>
> *32. Based on this discussion, we answer the reference as under:*
>
> > *"A 'child' and a "child in conflict with law" as defined under the Juvenile Justice (Care and Protection of Children) Act, 2015 can file an application under Section 438 of the Code of Criminal Procedure, 1973."*

10. The Division Bench of the Allahabad High Court in ***Mohammad Zaid and others vs. State of U.P. and others, 2023 (248) AIC 923***answered the reference in favour of the CICL while framing various questions. The reference was answered as under:-

> *"25. The reference to this Larger Bench thus, stands answered as follows:-*
>
> *(i) The limited window opened in the judgement of the learned Single Judge in the case of Shahaab Ali (Minor) for child in conflict with law confining his right to seek anticipatory bail before F.I.R. is lodged against him is incorrect. A child in conflict with law will have an equal and efficacious right to seek his remedy of anticipatory bail under Section 438 Cr.P.C. like any other citizen, but with the restrictions imposed in the said provision itself.*
>
> *(ii) Section 1(4) of the Act, 2015 does not exclude the application of Section 438 Cr.P.C. to a child in conflict with law after the F.I.R. is*

registered against him as there is no provision contrary in the Act 2015 to the Cr.P.C. to make it inapplicable.

(iii) A child in conflict with law can be arrested/apprehended/granted bail if necessary and any such situation arises.

(iv) A juvenile or a child in conflict with law can be arrested and/or apprehended if such a need arises, but he cannot be left remedy-less till the time of his arrest and/or apprehension. He can explore the remedy of anticipatory bail under Section 438 Cr.P.C. if a need arises. The remedy of bail under Section 12 of the Act 2015 can be invoked by a juvenile or a child in conflict with law at the appropriate stage.

(v) An inquiry is required to be conducted by the concerned Board for declaring a person as a juvenile and then extending the benefit of the beneficial legislation to him.

(vi) The required enquiry under Section 14 and preliminary assessment into heinous offence under Section 15 of the Act 2015 where required can be done while the child in conflict with law is on anticipatory bail.

26. While answering the questions referred to by the learned Single Judge, let the anticipatory bail applications be now placed before the appropriate Bench in the week commencing 03.7.2023 for disposal."

11. A perusal of the judgment would go on to show that a Single Bench in ***Shahaab Ali (Minor) and another vs. State of U.P., 2020 Cri LJ 4479*** which had held to the contrary was accordingly overruled while noticing that the 2015 Act is a self contained Statute and a beneficial legislation for which CICL could not be left remediless. Reliance was placed upon the judgment of the Bombay High Court in *Raman's case (supra)* and *Surabhi Jain's case (supra)* apart from the judgment of the Chhattisgarh High Court in *Sudhir Sharma's case (supra)*. Resultantly, in *Mohammad Zaid's case (supra),* the Division Bench led by the Hon'ble Chief Justice held that the Act was silent but there was no bar for grant of anticipatory bail and in the absence of any express bar, the CICL could not have been denied the

benefit. Reference was made to the bar under Section 18 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the provision under Section 18. The 2016 Rules being the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 were kept in mind as to the procedure how an FIR is not to be registered except where a heinous crime is committed and the protection given. Reference was made to *Gurbax Singh Sibbia's case (supra)* and *Sushila Aggarwal's case (supra)* that Section 438 Cr.P.C. did not take away the right and could not be to the detriment of the child and in no manner an ouster had been created and in the absence of any bar, the child could not be left remediless.

The Restrictive View:

12. The weight, on the other side, of non-maintainability is equally heavy to the extent that the four Division Benches of Madras, Chhattisgarh, Madhya Pradesh and Calcutta High Court have held to the contrary.

13. A perusal of the judgments as such would go on to show that in ***K. Vignesh vs. State, 2017 SCC Online Mad 28442,*** the Division Bench of the Madras High Court, while deciding the reference, came to the conclusion that there are lot of safeguards provided to the CICL under the Act and he could not be arrested. Therefore, the legislature did not consciously empower the police to arrest the child and, therefore, the application under Section 438 Cr.P.C. was not maintainable. The view taken in ***Ajith Kumar vs. State, 2016 (2) CTC 63*** was approved while over ruling other judgments while answering the reference. The provisions of Cr.P.C. and Chapter V of Cr.P.C. were referred as to how an arrest has to be made and the fact that there was a separate expression used as as much as “apprehend” under Section 10 of the 2015 Act and resultantly, a finding was arrived at that once a child cannot be arrested, the Act takes care of the interest of the child and the bail could only be refused on the ground that the child would come into association

with known criminals or expose the said person to moral, physical or psychological danger.

14. The Madhya Pradesh High Court in ***Criminal Revision No. 2112 of 2010, Ankesh Gurjar @ Ankit Gurjat vs. State of Madhya Pradesh*** *dated 20.01.2021* framed a question that the Legislature as such had consciously omitted to make available the benefit of anticipatory bail and went into the provisions of the 2015 Act and the fact that the United Nations had passed resolution in 1985, which had led to the Juvenile Justice Act, 1986 coming into force. The resolution had been ratified and accepted by the Government of India on 11.12.1992, which had led to the 2000 Act coming into force and the amendments made in the same in 2006 and 2011 before the 2015 Act came into force. The 2016 Rules were also taken into consideration that the FIR could only be registered when heinous offence is committed which attracted penalty of more than 7 years of imprisonment and the setting up of observation homes, stay homes and children homes and the concept of sending the apprehended and detained juvenile to Observation Home/Fit facility/One-stop Home or any of the institutions contemplated under 2015 Act was recognized and there was no concept of arrest. Resultantly, it was held that the benefit of anticipatory bail under Section 438 Cr.P.C. was not available to a juvenile and it would be as such abhorrent to the beneficial and rehabilitatory object behind the 2015 Act.

15. A similar view was taken by the Calcutta High Court in ***CRM-2739-2021,Suhana Khatun and others vs. State of West Bengal,*** *decided on 20.01.2022* wherein, it was held that in the absence of any likelihood of being arrested by enforcing agencies under the 2015 Act and the apprehension is only to be done in the case of heinous offences while keeping in view the Rules and the power of the Board being limited not to release the child in certain conditions was kept in mind and, thus, differing from earlier co-ordinate Bench Judgment in *Miss. Surabhi*

Jain's case (supra) and maintaining the view in *Krishna Garai's case (supra).* The view taken was that the application was not maintainable under Section 438 Cr.P.C. at the instance of CICL. The matter was also referred to the Chief Justice for constituting the larger Bench, which we believe is yet to decide on the said issue.

Purpose and Background of the 2015 Act:

16. In ***Abuzar Hossain @ Gulam Hossain vs. State of West Bengal, 2012(10) SCC 489***, which is followed in ***Parag Bhati vs. State of U.P., (2016) 12 SCC 744***, it was held that the benefit of the principle of benevolent legislation is to be given to the accused who is held to be a juvenile keeping in view the possibilities of the two views in regard to the age while keeping in mind the maturity of his mind rather than the innocence indicating that his plea of juvenility is more in the nature of the shield to dodge or dupe the arms of law. The said sentiment was again echoed by the Apex Court recently in the case of ***The State of Jammu and Kashmir (Now U.T. of Jammu & Kashmir) and Ors. vs. Shubam Sangra, 2023(1) R.C.R. (Criminal) 461***, while dealing with the Kathua rape and murder case. Accordingly, referring to the view taken in ***Om Prakash vs. State of Rajasthan, (2012) 5 SCC 201,*** it was noticed that the Juvenile Justice Act is certainly meant to treat a child accused with care and sensitivity offering him a chance to reform and settle into the mainstream of society, which is the underlying principle, but the Courts were put to caution as such regarding involvement of the juvenile delinquency which is a matter of great concern and requires immediate attention.

17. In the 2015 Act, there is a non-obstante clause under Section 1 sub-clause (4), which provides that the provisions of the Act shall apply to all matters concerning children in need of care and protection notwithstanding anything contained in any other law for the time being in force including the apprehension, detention, prosecution, penalty or imprisonment. The definitions as such would read as under:-

> ***"1. Short title, extend, commencement and application.—***
>
> *(1) to (3) xxx xxx xxx 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 fo children in need of care and protection."*
>
> ***"2. Definitions.--***
>
> *(1) to (9) xxx xxx xxx xxx*
>
> *(10) "Board" means a Juvenile Justice Board constituted under section 4;*
>
> *(11) xxx xxx xxx xxx*
>
> *(12). "child" means a person who has not completed eighteen years of age;*
>
> *(13). "child in conflict with law' means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence;*
>
> *xxx xxx xxx xxx*
>
> *(35) "juvenile" means a child below the age of eighteen years;"*

18. The offences under the 2015 Act have been provided into three categories; "petty offences" under Section 2(45), "serious offences" under Section 2(54) and "heinous offences" under Section 2(33). The said provisions read thus:-

> *"2(45)"petty offences" includes the offences for which the maximum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment up to three years;*
>
> *(54) "serious offences" includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is,-*
>
> *(a) minimum imprisonment for a term more than three years and not exceeding seven years; or*

(b) maximum imprisonment for a term more than seven years but no minimum imprisonment or minimum imprisonment of less than seven years is provided.

(33) "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more;

19. Similarly, Section 4 provides for the constitution of the Juvenile Justice Board irrespective of anything contained in Cr.P.C. and the said Board has to be constituted in every district for exercising its power for discharging functions in relation to the CICL. The Board is to consist of a Metropolitan Magistrate or a Judicial Magistrate Ist Class with at least three years' experience and alongwith two social workers, out of which, one has to be a woman to form a Bench. There are various restrictions as such as to the limitations of the social workers and also the eligibility of the social workers under Section 4(3) to 4(7). Section 4 of the 2015 Act reads thus:-

"***4. Juvenile Justice Board.-****(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the State Government shall, constitute for every district, one or more Juvenile Justice Boards for exercising the powers and discharging its functions relating to children in conflict with law under this Act.*

(2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(3) No social worker shall be appointed as a member of the Board unless such person has been actively involved in health, education, or welfare activities pertaining to children for atleast

seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law.

(4) No person shall be eligible for selection as a member of the Board, if he--

(i) has any past record of violation of human rights or child rights;

(ii) has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or has not been granted full pardon in respect of such offence;

(iii) has been removed or dismissed from service of the Central Government or a State Government or an undertaking or corporation owned or controlled by the Central Government or a State Government; (iv) has ever indulged in child abuse or employment of child labour or any other violation of human rights or immoral act.

(5) The State Government shall ensure that induction training and sensitisation of all members including Principal Magistrate of the Board on care, protection, rehabilitation, legal provisions and justice for children, as may be prescribed, is provided within a period of sixty days from the date of appointment.

(6) The term of office of the members of the Board and the manner in which such member may resign shall be such, as may be prescribed.

(7) The appointment of any member of the Board, except the Principal Magistrate, may be terminated after holding an inquiry by the State Government, if he--

(i) has been found guilty of misuse of power vested under this Act; or

(ii) fails to attend the proceedings of the Board consecutively for three months without any valid reason; or

(iii) fails to attend [minimum] three-fourths of the sittings in a year; or

(iv) becomes ineligible under sub-section (4) during his term as a member.

20. Sections 10 and 12 provide for procedure as and when a child in conflict with law is apprehended by the police and how he/she is to be dealt with and the right of bail as such, whereas Section 11 talks about the role of the person in whose charge CICL is placed. Section 10, 11 and 12 of the 2015 Act read as under:-

> ***"10. Apprehension of child alleged to be in conflict with law.--*** *(1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:*
>
> *Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail.*
>
> *(2) The State Government shall make rules consistent with this Act,*
>
> *(i) to provide for persons through whom (including registered voluntary or non-governmental organisations) any child alleged to be in conflict with law may be produced before the Board;*
>
> *(ii) to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case may be.*
>
> ***11. Role of person in whose charge child in conflict with law is placed.--*** *Any person in whose charge a child in conflict with law is placed, shall while the order is in force, have responsibility of the said child, as if the said person was the child's parent and responsible for the child's maintenance:*
>
> *Provided that the child shall continue in such persons charge for the period stated by the Board, notwithstanding that the said child is claimed by the parents or any other person except when the Board is of the opinion that the parent or any other person are fit to exercise charge over such child.*

> ***12. Bail to a person who is apparently a child alleged to be in conflict with law.--*** *(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*
>
> *Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the persons release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.*
>
> *(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home [1][or a place of safety, as the case may be] in such manner as may be prescribed until the person can be brought before a Board.*
>
> *(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.*
>
> *(4) When a child in conflict with law is unable to fulfill the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."*

21. It is not disputed that the child in conflict with law is to be produced before the Board who is to proceed with in accordance with the provisions of the Act. We are seized with the issue regarding the rights of a child before production. Article

21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The yawning chasm is the reason for the reference as to at this stage whether a child is entitled for any protection keeping in mind that the Act is an embodiment as such of a beneficial piece of legislation. This aspect has been time and again highlighted by the Apex Court if one goes back to the judgment in ***Shipli Mittal vs. State of NCT of Delhi and Ors., (2020) 2 SCC 787*** wherein a threadbare discussion as to how the Act came into force keeping in view the United Nations Convention on the Rights of Child and adopted by the United Nations General Assembly on 20.11.1989. The enactment of the 2002 Act while repealing the 1986 Act and, thereafter, the enactment of 2015 Act were all discussed while dealing with the gap as such again in the legislation, wherein the offences prescribing a maximum sentence of more than seven years but not providing any minimum sentence and whether they could be considered as a heinous offence within the meaning of Section 2(33) of 2015 Act was the question which had arisen before the Court. The protection granted to the child in conflict with law regarding the power of sentencing to death and life imprisonment was kept in mind and also the fact that the Court cannot re-write the law but the intention of the Legislature cannot be lost sight of while keeping in mind the golden rules of interpretation and whether the 4th category could be created. Resultantly, while keeping in mind the scheme of the Act that whether a child should be protected and treating children with an exception to the Rule. It was held that the exception has to be given a restrictive meaning and a view in favour of the children was taken while dealing with the offence which does not provide a minimum sentence of seven years which cannot be treated to be a heinous offence. The relevant portions of the aforesaid judgment reads as under:-

> *"34. From the scheme of Section 14, 15 and 19 referred to above it is clear that the Legislature felt that before the juvenile is tried as an*

adult a very detailed study must be done and the procedure laid down has to be followed. Even if a child commits a heinous crime, he is not automatically to be tried as an adult. This also clearly indicates that the meaning of the words 'heinous offence' cannot be expanded by removing the word 'minimum' from the definition.

35. Though we are of the view that the word 'minimum' cannot be treated as surplusage, yet we are duty bound to decide as to how the children who have committed an offence falling within the 4th category should be dealt with. We are conscious of the views expressed by us above that this Court cannot legislate. However, if we do not deal with this issue there would be no guidance to the Juvenile Justice Boards to deal with children who have committed such offences which definitely are serious, or may be more than serious offences, even if they are not heinous offences. Since two views are possible we would prefer to take a view which is in favour of children and, in our opinion, the Legislature should take the call in this matter, but till it does so, in exercise of powers conferred under Article142 of the Constitution, we direct that from the date when the Act of 2015 came into force, all children who have committed offences falling in the 4th category shall be dealt with in the same manner as children who have committed 'serious offences'.

36. In view of the above discussion we dispose of the appeal by answering the question set out in the first part of the judgment in the negative and hold that an offence which does not provide a minimum sentence of 7 years cannot be treated to be an heinous offence. However, in view of what we have held above, the Act does not deal with the 4th category of offences viz., offence where the maximum sentence is more than 7 years imprisonment, but no minimum sentence or minimum sentence of less than 7 years is provided, shall be treated as 'serious offences' within the meaning of the Act and dealt with accordingly till the Parliament takes the call on the matter."

22. It is, thus, the vehement argument of the amicus Ms. Tanu Bedi that Section 2(54) was amended because of the result of the abovesaid judgment.

Reasoning to take a Broader Prospective:-

23. Article 39 of the Constitution provides that certain principles of policy are to be followed by the State, whereas sub-clause (3) provides that the State, in principle, shall direct its policies towards securing the health and strength of workers, men and women and the tender age of children would not be abused. Similarly, Article 15(3) of the Constitution provides that the State shall endeavour prohibition of discrimination on the ground of religion, race, caste, sex or place of birth and gives the powers and protects the State from making a special provision for women and children. In ***Shri Gurbax Singh Sibbia & Ors. Vs State of Punjab 1980 (2) SCC 565,*** the Apex Court was seized of the personal liberty of the individual who had not been convicted of the offence regarding which he sought anticipatory bail in view of the fact that there is a presumption of him to be innocent. The argument as such was raised that the Legislature imposes unreasonable restrictions on the grant of anticipatory bail which are liable to be struck down being violative of Article 21 of the Constitution of India. Resultantly, it is held that the beneficial provisions contained in Section 438 of the 1973 Act must be saved and not jettisoned basically on the principle that an innocent person is entitled to freedom and opportunity to look after his own case and to establish his innocence.

24. The provisions of Section 438 Cr.P.C., thus, were examined and it was held that mere fear is not belief, which reason is not enough for the applicant to show that he has some sought of vague apprehension that someone is going to make an accusation against him in pursuance of which, he may be arrested. The language also which was used was that “to give effect to Section 438, the anticipatory bail is to be sought when there is mere apprehension of arrest.”

25. The view was followed in *Sushila Aggarwal’s case (supra)*by holding that the provision under Section 438 of the 1973 Act is a pro-liberty provision and its

enactment as such was accepted by the parliament of the crucial underpinning of personal liberty in a free and democratic country. The final conclusion by the Constitutional Court again was that the application seeking anticipatory bail should contain bare essential facts pertaining to the offence and why the applicant reasonably apprehends arrest. The factor which was to be kept in mind was to evaluate the threat or apprehension and the anticipatory bail could be filed as long as there was a reasonable basis for apprehending arrest. The relevant observations read from *Sushila Aggarwal's case (supra)* read thus:-

> *"**92.1** Consistent with the judgment in Shri Gurbaksh Singh Sibbia and others v. State of Punjab, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest."*

26. While dealing with the limitation provided that whether there should be a fixed period to enable the person to surrender and seek regular bail, the answer was that there can be no inflexible time frame for which an order of anticipatory bail can continue and the anticipatory bail, depending on the conduct and behavior of the accused, can continue after the filing of the charge sheet. The earlier view as such were overruled by holding that once an FIR was lodged and the facts are clear and, therefore, there were reasonable basis for apprehending arrest.

What is Apprehension; Detention; Custody and Arrest:

27. In principle, the question which is to be kept in mind with which we are dealing at this stage is the word "apprehension" at the point of time before the CICL has to be produced before the Board. The word 'apprehend' as such is a feel of fear that something bad may happen. `Apprehend' also means to catch somebody though the strict terminology of arrest may not be used. The usage of same is finally to apprehend the person which would be an aim to catch someone who took the law in his hands or who does something wrong. Normal term of apprehension is pertaining to arrest someone or detain someone who could be a suspect near the scene of the crime. The apprehension may be for a second or minute or hours, whereas the detention can be for a longer period which can be specified. In contradiction with the criminal law, if someone is to be taken into custody, it could be by way of arrest with legal warrant or authority. As per the Cambridge dictionary, 'apprehend' means to catch and arrest someone who has not obeyed the law.

28. The word "apprehension", as per the Blacks Law Dictionary, is:-

(i) seizure in the name of law; arrest, apprehension of a criminal;

(ii) Perception; comprehension, belief: the tort of assault requires apprehension by the plaintiff of imminent contact

(iii) Fear and anxiety about the future especially about dealing with an unpleasant person or as difficult situation."

29. As per Collins Dictionary, the word "apprehension" is also defined as the act of capturing or arresting whereas as per the Cambridge Dictionary, it would mean to catch or arrest someone who has evaded the law. Apprehension is, thus, an action that describes seizing, capturing or arresting a person and is to be seen in the context of police intervention and a situation where an alleged criminal is captured

and taken away by Law Enforcement Agencies. The term "detention", as per Black's Law Dictionary reads thus:-

> *"A person held in custody, confined or delayed by an authority, such as a law enforcement or government; a person held indefinitely without trial, especially for political reasons.*

30. Thus, it is an act of holding in custody, or confinement for a short period and amounts to captivity or incarceration.

31. The term arrest has not been defined in Cr.P.C. or in IPC though how arrest is to be made is referred to in Section 41. However, it is derived from a french word 'arrater' which means to stop or stay and signifies a restraint of a person. The niceties of the word 'custody' and 'arrest' and that they are not synonymous words was also examined by the Apex Court in ***State of Haryana and others vs. Dinesh Kumar, (2008) 3 SCC 222.*** It was held that it is true that in every arrest there is a custody not not vice-versa and custody as such materializes into an arrest.Resultantly, it was held that mere surrender as such in Court for grant of bail may not be arrest as such but would be judicial custody. In ***Directorate of Enforcement vs. Deepak Mahajan, (1994) 3 SCC 440,*** it was held that if the two terms are interpreted as synonymous, it would be an ultra legalistic interpretation and if accepted and adopted would lead to startling anomaly and resulting in serious consequences. Thus, if noticed from this aspect, it would be apparent that if a person is to be apprehended and to be produced before Court, he but has to be in custody of an officer since apprehend means seizing or taking hold of a man. This power is only associated alongwith the power to investigate as laid down in ***Bhavesh Jayanti Lakhani vs. State of Maharashtra and others, (2009) 9 SCC 551.*** It is not disputed that the moment a juvenile is apprehended, he/she would necessarily has to be produced before the Juvenile Justice Board and, thus, detained. Therefore, the custody of the person being with the police officials would

amount to a detention or almost akin to arrest but though not formally provided under the Act with a definite purpose.

32. In contrast, the condition which would give the cause of action to invoke the provisions under Section 438 Cr.P.C. would be where a person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence.

33. Counsel also laid stress upon the fact that the word "apprehension", if translated as such in vernacular, amounts to *"girftaar",* which would *pari materia* to bring it at par with the word "arrest" as provided for in Section 438 Cr.P.C. and if Hindi translation of the Act is to be seen, the word "apprehension" has also been translated as *"girftaar".* Thus, for all practical purposes, there is an overlap as such and the benefit has to flow to the juvenile keeping in view of the fact that it is a beneficial piece of legislation which has time and again been upheld by the Apex Court while dealing with various provisions of the Act and also the earlier enactments which were holding the field at that point of time.

34. In fact, the word 'apprehend' as such has a larger meaning than arrest which can be at the initial stage before a formal stage of arrest is made. It is in such circumstances, the Act provides protection to a juvenile from such restraint being put upon him in the form of any preventive detention or from any joint proceedings of a child to be in conflict with law.

35. A lot of stress is also being made on Rule 8 of the 2016 Rules by Mr. Girdhar opposing the larger view that no FIR is to be registered except in an heinous crime and only when it is committed jointly with other adults, the lodging of the said FIR is permissible. In all other matters, information was only to be recorded by the Special Juvenile Police Unit or the Child Welfare Police Officer in the General Daily Diary followed by a social background report of the child and the

circumstances under which the child was apprehended and forward it to the Board before the first hearing.

36. The relevant Rules which provide protection as such are laid down under Rule 8(1) which provides that no FIR is to be registered except if any heinous offences are alleged to have been committed by a child or when such offences are committed jointly with adults. Thus, an exceptions is made out as such to grant protection to the child. The proviso provides that the power to apprehend should be exercised only in regard to heinous offences unless it is in the best interest of the child. For cases of petty and serious offences, apprehending the child is not necessary in the interest of the child and intimation is to go alongwith the social background of the child to the Special Juvenile Police Unit or Child Welfare Police Officer alongwith an intimation to the parents or guardians as to when the child is to be produced for hearing before the Board. Various safeguards have been further provided as to how the child is to be treated under sub-clause (2) and the fact that he is not to be sent to the police lock up under sub-clause (3) and the Child Welfare Officer to whom the child is to be transferred, should be in plain clothes and not in uniform. Rule 9 talks about the production before the Board within 24 hours from his being apprehended alongwith report explaining the reasons and the procedure to be followed therein. Rules 8 and 9 of the 2016 Rules read thus:-

> ***"8. Pre-Production action of Police and other Agencies.-***
>
> *(1) No First Information Report shall be registered except where a heinous offence is alleged to have been committed by the child, or when such offence is alleged to have been committed jointly with adults. In all other matters, the Special Juvenile Police Unit or the Child Welfare Police Officer shall record the information regarding the offence alleged to have been committed by the child in the general daily diary followed by a social background report of the child in* ***Form 1*** *and circumstances under which the child was apprehended, wherever applicable, and forward it to the Board before the first hearing:*

Provided that the power to apprehend shall only be exercised with regard to heinous offences, unless it is in the best interest of the child. For all other cases involving petty and serious offences and cases where apprehending the child is not necessary in the interest of the child, the police or Special Juvenile Police Unit or Child Welfare Police Officer shall forward the information regarding the nature of offence alleged to be committed by the child along with his social background report in ***Form 1*** *to the Board and intimate the parents or guardian of the child as to when the child is to be produced for hearing before the Board.*

(2) When a child alleged to be in conflict with law is apprehended by the police, the police officer concerned shall place the child under the charge of the Special Juvenile Police Unit or the Child Welfare Police Officer, who shall immediately inform:

(i) the parents or guardian of the child that the child has been apprehended along with the address of the Board where the child will be produced and the date and time when the parents or guardian need to be present before the Board;

(ii) the Probation Officer concerned, that the child has been apprehended so as to enable him to obtain information regarding social background of the child and other material circumstances likely to be of assistance to the Board for conducting the inquiry; and

(iii) a Child Welfare Officer or a Case Worker, to accompany the Special Juvenile Police Unit or Child Welfare Police Officer while producing the child before the Board within twenty- four hours of his apprehension.

(3) The police officer apprehending a child alleged to be in conflict with law shall:

(i) not send the child to a police lock-up and not delay the child being transferred to the Child Welfare Police Officer from the nearest police station. The police officer may under sub-section (2) of section 12 of the Act send the person apprehended to an observation home only for such period till he is produced before the Board i.e. within twenty-four hours of his being apprehended and appropriate orders are obtained as per ***rule 9*** *of these rules;*

(ii) not hand-cuff, chain or otherwise fetter a child and shall not use any coercion or force on the child;

(iii) inform the child promptly and directly of the charges levelled against him through his parent or guardian and if a First Information Report is registered, copy of the same shall be made available to the child or copy of the police report shall be given to the parent or guardian;

[(iii-a) also inform the child and the parent or guardian immediately regarding the rights and privileges of the child under the Act and rules;

(iii-b) rights of the child shall also be displayed in every police station and at prominent places in the Observation Homes, Special Homes, Place of Safety;]

(iv) provide appropriate medical assistance, assistance of interpreter or a special educator, or any other assistance which the child may require, as the case may be;

(v) not compel the child to confess his guilt and he shall be interviewed only at the Special Juvenile Police Unit or at a child-friendly premises or at a child friendly corner in the police station, which does not give the feel of a police station or of being under custodial interrogation. The parent or guardian, may be present during the interview of the child by the police;

(vi) not ask the child to sign any statement; and

(vii) inform the District Legal Services Authority for providing free legal aid to the child.

(4) The Child Welfare Police Officer shall be in plain clothes and not in uniform.

(5) The Child Welfare Police Officer shall record the social background of the child and circumstances of apprehending in every case of alleged involvement of the child in an offence in Form 1which shall be forwarded to the Board forthwith. For gathering the best available information, it shall be necessary upon the Special Juvenile Police Unit or the Child Welfare Police Officer to contact the parent or guardian of the child.

(6) A list of all designated Child Welfare Police Officers, Child Welfare Officers, Probation Officers, Para Legal Volunteers, District Legal Services Authorities and registered voluntary and non-governmental organisations in a district, Principal Magistrate and members of the Board, members of Special Juvenile Police Unit and Childline Services with contact details shall be prominently displayed in every police station.

(7) When the child is released in a case where apprehending of the child is not warranted, the parents or guardians or a fit person in whose custody the child alleged to be in conflict with law is placed in the best interest of the child, shall furnish an undertaking on a non-judicial paper in Form 2 to ensure their presence on the dates during inquiry or proceedings before the Board.

(8) The State Government shall maintain a panel of voluntary or non-governmental organisations or persons who are in a position to provide the services of probation, counselling, case work and also associate with the Police or Special Juvenile Police Unit or the Child Welfare Police Officer, and have the requisite expertise to assist in physical production of the child before the Board within twenty-four hours and during pendency of the proceedings and the panel of such voluntary or non-governmental organisations or persons shall be forwarded to the Board.

(9) The State Government shall provide funds to the police or Special Juvenile Police Unit or the Child Welfare Police Officer or Case Worker or person for the safety and protection of children and provision of food and basic amenities including travel cost and emergency medical care to the child apprehended or kept under their charge during the period such children are with them.

9. Production of the child alleged to be in conflict with law before the Board.-*(1) When the child alleged to be in conflict with law is apprehended, he shall be produced before the Board within twenty-four hours of his being apprehended, along with a report explaining the reasons for the child being apprehended by the police.*

(2) On production of the child before the Board, the Board may pass orders as deemed necessary, including sending the child to an observation home or a place of safety or a fit facility or a fit person.

[(2A) The Board shall ensure that the information regarding the child referred to in sub-rule (2) is uploaded on a portal, as may be specified by the Central Government in this behalf.]

(3) Where the child produced before the Board is covered under [section 78 and section 83 of the Act, including a child who has surrendered, the Board may, after due inquiry and being satisfied of the circumstances of the child, transfer the child to the Committee as a child in need of care and protection for necessary action, and or pass appropriate directions for rehabilitation, including orders for safe custody and protection of the child and transfer to a fit facility recognised for the purpose which shall have the capacity to provide appropriate protection, and consider transferring the child out of the district or out of the State to another State for the protection and safety of the child.

(4) Where the child alleged to be in conflict with law has not been apprehended and the information in this regard is forwarded by the police or Special Juvenile Police Unit or Child Welfare Police Officer to the Board, the Board shall require the child to appear before it at the earliest so that measures for rehabilitation, where necessary, can be initiated, though the final report may be filed subsequently.

(5) In case the Board is not sitting, the child alleged to be in conflict with law shall be produced before a single member of the Board under sub-section (2) of section 7 of the Act.

(6) In case the child alleged to be in conflict with law cannot be produced before the Board or even a single member of the Board due to child being apprehended during odd hours or distance, the child shall be kept by the Child Welfare Police Officer in the Observation Home in accordance with rule69 Dof these rules or in a fit facility and the child shall be produced before the Board thereafter, within twenty-four hours of apprehending the child.

(7) When a child is produced before an individual member of the Board, and an order is obtained, such order shall be ratified by the Board in its next meeting."

37. Apparently, the said Rules also provide for an exception in the form of proviso that power to apprehend shall only be exercised with regard to the heinous offences unless it is in the best interest of the child. Thus, merely because of the

fact that the word "arrest" is missing in the Act, which is a complete Code in itself, we are of the considered opinion that a protection can be granted to CICL before he puts in appearance before the Board who will then proceed further in accordance with the provisions of the Act. The impact of apprehension can be held to be the same as an "arrest" as the liberty is, therefore, curtailed. Apparently, while enacting the 2002 Act, the word "arrest" was provided for in Section 12, where it was laid down that when a juvenile is arrested or detained or appears and is brought before a Board, he has to be released on bail subject to various conditions. Section 12 of the 2015 Act omits the word "arrest". Section 12 of the 2015 Act itself provides that any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person. The proviso attached to Section 12 of the 2015 Act provides restrictions regarding release on bail only on the ground that the release is likely to bring that person into association with any known criminal or expose the said persons to moral, physical or psychological danger or the person's release would defeat the ends of justice and specific reasons have to be recorded for denying the bail.

38. Reference can also be made to the protection provided under Sections 22 and 23 of the Act wherein, it is specifically mentioned that notwithstanding anything to the contrary provided under the Cr.P.C. or any preventive detention law for the time being in force, no proceedings shall be instituted and no order shall be passed under Chapter VIII of the Cr.P.C. which provides security for keeping peace and good behaviour. Thus, the provisions of Section 106 and 107 Cr.P.C. as such and the power to imprison in default of the security has also been granted in effect that the preventive measures of the execution as such under Section 107 has been kept

out of from the ambit as such of the 2015 Act. Similarly, under Section 23 of the 2015 Act, no joint proceedings of the CICL and a person who is not a child has been provided irrespective of the provisions of Section 223 Cr.P.C., which provides for joint trial. Sections 22 and 23 of the 2015 Act read thus:-

> ***"22. Proceeding under Chapter VIII of the Code of Criminal Procedure not to apply against child.***
> *Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any preventive detention law for the time being in force, no proceeding shall be instituted and no order shall be passed against any child under Chapter VIII of the said Code.*
>
> ***23. No joint proceedings of child in conflict with law and person not a child.-****(1) Notwithstanding anything contained in section 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, there shall be no joint proceedings of a child alleged to be in conflict with law, with a person who is not a child.*
>
> *(2) If during the inquiry by the Board or by the Childrens Court, the person alleged to be in conflict with law is found that he is not a child, such person shall not be tried along with a child."*

39. It is, thus, apparent that at all places in the Act, the protection has been granted to the CICL. The interpretation, thus, has to be that the Legislature with the intention has deleted the word "arrest" keeping in mind the provisions in the Act and, therefore, there is only the word "apprehension" which has been used as a precursor is to the final arrest. Once a protection is granted to adults as such under Section 438 Cr.P.C. on the ground of apprehension of arrest, we do not seem any tangible reasons as to why the moment a juvenile is under the threat of apprehension, why the benefit of the provisions of Section 438 Cr. P.C. should be denied. Reference by Mr. Girdhar to Section 97 of the Act as to how the children are to be kept in Children's Home or Special Home and a report has to be obtained as similar to Section 98 regarding the leave of absence to a child placed in an

institution are the provisions which are placed in Chapter X under the Miscellaneous head. It is at a later stage how the rights of the children as such have to be kept in mind and it does not talk about any power as such at the prior point of time at the initial stage, with which are seized of. Rule 82A of 2016 Rules also similarly talks about an order of release to be made and how the child is to be placed and restored after hearing the child, his parents or guardians. The willingness of the child is to be seen and all are subsequent provisions after the Board has passed an order. In the absence of any exclusion as such that the provisions of Section 438 Cr.P.C. would not apply, we do not see any valid reason as to why any restrictive view is to be taken. It is time and again held that the bail is the rule and denial is the exception and for a child to be placed under disadvantage on account of the fact that the word "arrest" has not been mentioned in the Act does not do any justice to the purpose of the Act. Rather it is a conscious act of the legislation keeping in mind the beneficial provisions as such the omission as such has been made and it would not debar the children from the benefit of the provisions of Section 438 of the Act.

40. Section 8(2) of the Act provides that the powers conferred upon the Board may also exercised by the High Court and the Children's Court when proceedings come before it under Section 19 in appeal or revision. Otherwise, Section 19 further gives the powers to the Children's Court to decide after getting an assessment done from the Board under Section 15 and the right of the child is always thus been open. The Children's Court has been defined under Section 2(20) of the 2015 Act and further provides that where such Courts have not been designated, the Court of Sessions would have the jurisdiction to try the offences under the Act. Vide notification dated 10.09.2013 issued by Principal Secretary to the Government of Punjab, Courts of all the Sessions Judges and Additional

Sessions Judges [except the Additional Sessions Judge (Adhoc), Fast Track Courts] have been given the power of Children's Court. The said notification reads thus:-

*"**GOVERNMENT OF PUNJAB***

DEPARTMENT OF HOME AFFAIRS AND JUSTICE

NOTIFICATION

The 10th September, 2013

No.S.O. 78/C.A.4/2006/S.25/2013:- *In suppression of the Government of Punjab, Department of Home Affairs and Justice, Notification No.S.O.95/C.A.4/2006/S.25/2011, dated the 16th November, 2011, and in exercise of the powers conferred by section 25 of the Commissions for Protection of Child Rights Act, 2005 (Central Act No.4 of 2006), and all other powers enabling him in this behalf, the Governor of Punjab with consultation of the Chief Justice of the High Court of Punjab and Haryana, is pleased to specify the courts of all the Sessions Judges and Additional Sessions Judges, at each district headquarter in the State of Punjab (except the Additional Sessions Judge (Adhoc), Fast Track Courts), to be the Children's courts, for providing speedy trial of offences against children or violation of child rights under the said Act, for the area falling within their respective jurisdiction.*

AND further the Children's Courts so specified above under the aforesaid Commissions for Protection of Child Rights Act, 2005, shall be deemed to be the Special Courts, in pursuance of the provisions of the proviso to –sub-section (I) of section 28 of the Protection of Children from Sexual Offences Act, 2012 (Central Act No.32 of 2012), to try the offences under the Act.

***D.S. BAINS**,*

Principal Secretary to the Government of Punjab,
Department of Home Affairs and Justice."

41. There is no dispute that the Court of Sessions and the High Court have the power to grant the benefit of anticipatory bail under Section 438 Cr.P.C. It is,

thus, expressly clear that the right of the child is, thus, governed by these provisions under the Act itself. Section 2(20) of the 2015 Act reads thus:-

> *"(20) "Children's Court" means a court established under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court under the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act;"*

42. Under Section 14(5)(d) & (e) of 2015 Act, the procedure prescribed under the 1973 Code is to be applied for disposal of the petty offences and serious offences. Section 15(2) of the 2015 Act contains similar provisions that once the Board is satisfied on the basis of preliminary assessment, the matter has to be disposed of by it by following the procedure contained in the 1973 Code. Section 19(1)(i) of the 2015 Act provides for the proceedings of the Criminal Procedure Code and even the Child Welfare Committee under Section is to function as a Bench which is similar to Section 4(2) wherein also the Principal Magistrate having at least three years' experience and two judicial workers have to form a Bench while examining the right of the child.

43. It is, thus, apparent that the stress is on the rights of the child which is not even left to a single person under the Act at the initial stage, which all point towards one aspect that the primary consideration is the welfare of the child. The Act time and again has reference to the 1973 Code at all stages, as mentioned above, and also in appeal as mentioned under Section 101(5) of the 2015 Act. The power of the High Court to call either on its own motion or on an application received in this behalf to call for the record of any proceedings in which any Committee or Board or Children's Court or Court has passed an order, for the purpose of satisfying itself as to the legality or propriety of any such order and its power to pass such order in relation thereto as it thinks fit.

44. Section 4 of the Cr.P.C. provides that how the trial of offences under IPC and other laws has to be done. It lays down that all investigations and queries had to be dealt with according to the provisions hereinafter contained. Similarly, under sub-clause 2 of the said Section, it is provided that all investigations and queries under any other law have otherwise to be also dealt with according to the same provisions but subject to any enactments for the time being in force which regulate the manner or place of investigation/inquiry. Similarly, Section 5 provides that the Code shall not affect any special or local law for the time being or any special form of procedure prescribed by any other law for the time being in force in the absence of a specific provision to the contrary. Thus, it would be clear that there is no such bar under the Act, regarding the right of benefit of the claim for anticipatory bail. Sections 4 and 5 of Cr.P.C. reads thus:-

> *"4.* ***Trial of offences under the Indian Penal Code and other laws.****—(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.*
>
> *(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offences.*
>
> ***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."*

45. If it is read in juxtaposition with Section 12 and the provisions noticed above under Sections 14, 15, 101 of the 2015 Act, it would go on to show that the rights

of the child as such who has committed a non-bailable offence and is liable to be apprehended or detained for purposes of to be brought before the Board provides an exception that he shall be released on bail notwithstanding anything contained in the Cr.P.C. or in any other law. Thus, further protection had been provided under Section 12 that if there are any exceptions as such regarding the provisions which have been made in the Cr.P.C., the same would not come in the way of a child who is to seek the benefit under Section 12. Thus, the nature and gravity of the accusation, the antecedents of the applicant and the possibility of fleeing from justice etc. are the factors which are to be kept in mind under Section 438 Cr.P.C. in case of a normal accused which would not stand in the way of CICL.

45A. In*Shilpi Mittal's case (supra)***,** the Golden Rule of Interpretation was discussed and it was held that though the Courts cannot add or subtract the words from the Statute but if the intention of the Legislature is clear, then the Court can get over the inartistic or clumsy wording of the Statute. The relevant paragraphs read thus:-

> *23. The Golden Rule of Interpretation was laid down by the House of Lords in* ***Grey*** *v.* ***Pearson*** *(1857) 6 HLC 61, as follows:*
>
> > *...I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther…..*
>
> *24. The Privy Council in* ***Salmon*** *v.* ***Duncombe and Ors.*** *(1886) 11 AC 627 stated the principle in the following terms:*

> *"It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskillfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used.....*

25. In Justice G.P. Singh's treatise, "Principles of Statutory Interpretation' the doctrine of surplusage as a limit on the traditional rule of strict construction has been referred to. The main judgment on this point is the decision of the House of Lords in ***McMonagle vs. Westminster City Council*** *MANU/UKHL/0029/1990 : [1990] 2 A.C. 716. In that case the defendant's premises contained a machine which on insertion of a coin revealed two naked women in a manifestly immoral manner. The defendant was charged with using this premises as a sex establishment without any licence. His contention was that the Act (Local Government (Miscellaneous Provisions) Act, 1982) used the words 'which is not unlawful' and since he was conducting an unlawful activity he did not require a licence. It was in this context that the House of Lords held that the words 'which are not unlawful' should be treated as surplusage and as having been introduced by incompetent draftsmanship. In that case the intention of the Legislature was clear that no sex establishment could be set up without a licence. The words 'which is not unlawful' would render the entire provision nugatory. That does not happen in this case. What has happened in this case is that there is a 4th category of offences which is not dealt with under the Act. It cannot be said with certainty that the Legislature intended to include this 4th category of offences in the category of 'heinous offences'. Merely because removing the word 'minimum' would make the Act workable is not a sufficient ground to hold that the word 'minimum' is surplusage.*

26. This Court in ***Vasant Ganpat Padave*** *vs.* ***Anant Mahadev Sawant*** *was dealing with the provisions of Section 32 F(1)(a) of the Maharashtra Tenancy and Agricultural Lands Act, 1948. It was an admitted case of the parties that this was a law for agrarian reforms. The provision in issue deals with the rights of the tenant to purchase the property where the landlord is a widow, minor or person with mental or physical disability. This Section essentially gave a right to the tenant to exercise his right of purchase within one year*

from the expiry of the period during which such landlord is entitled to terminate the tenancy. The Section literally provided that the landlord shall send an intimation to the tenant of the fact that he has attained majority before the expiry of the period during which the landlord is entitled to terminate the tenancy under Section 31. Though a widow or a disabled person were not required to give notice for the tenant to exercise his right of purchase, in the case of a minor unless the minor on attaining majority issued such a notice, the tenant would not be able to exercise his right of purchase. Effectively the minor on attaining majority cold defeat the right of the tenant by not issuing the notice. It is in this context that this Court held that this would create such an anomaly that it would turn the entire scheme of agrarian reform on its head. Therefore, it held as follows:

> ***25.*** *… This anomaly indeed turns the entire scheme of agrarian reform on its head. We have thus to see whether the language of Section 32F can be added to or subtracted from, in order that the absurdity aforementioned and the discrimination between persons who are similarly situate be obviated.*

After discussing various rules of interpretation the Court held that instead of striking out the classification as a whole it would delete the words 'of the fact that he has attained majority'. We may refer to para 43 which is relevant:

> ***"43.*** *Given the fact that the object of the 1956 Amendment, which is an agrarian reform legislation, and is to give the tiller of the soil statutory title to land which such tiller cultivates; and, given the fact that the literal interpretation of Section 32F(1)(a) would be contrary to justice and reason and would lead to great hardship qua persons who are similarly circumstanced; as also to the absurdity of land going back to an absentee landlord when he has lost the right of personal cultivation, in the teeth of the object of the 1956 Amendment as mentioned hereinabove, we delete the words "..of the fact that he has attained majority..". Without these words, therefore, the landlord belonging to all three categories has to send an intimation to the tenant, before the expiry of the period during which such landlord is entitled to terminate the tenancy under Section 31."*

> ***27.*** *Mr. Luthra, drew our attention to the speech of the Minister while introducing the Bill in relation to the Act of 2015. We need not repeat the speech in detail but reading of the same clearly indicates that the Minister while dealing with the issue of 'heinous offences' wherein the children could be tried as adults mainly made reference to the offences of murder, rape and terrorism. There are some other speeches that have been referred to by Mr. Luthra, but we are not referring to the same because the intention of the Legislature as a whole cannot be gauged from the speeches of individual members, some of whom supported the Bill and some of whom did not support the Bill. The main reliance could only be made on the objects and reasons and introduction of the Bill by the Minister which basically makes reference to offences like murder, rape, terrorism, where the minimum punishment is more than 7 years.*
>
> ***28.*** *There can be no quarrel with the submission made by Mr. Siddharth Luthra that in a given circumstance, this Court can even add or subtract words from a statute. However, this can be done only when the intention of the Legislature is clear. We not only have to look at the principles of statutory interpretation but in the present case, the conundrum we face is that how do we decipher the intention of the Legislature. It is not necessary that the intention of the Legislature is the one what the judge feels it should be. If the intention of the Legislature is clear then the Court can get over the inartistic or clumsy wording of the statute. However, when the wording of the statute is clear but the intention of the Legislature is unclear, the Court cannot add or subtract words from the statute to give it a meaning which the Court feels would fit into the scheme of things."*

45B. Similarly, in ***X vs.Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi and another, (2023) 9 SCC 433,*** the Apex Court went on to hold that the intention of the Legislature and the true legal meaning of the enactment and the mischief that the Statute was seeking is to be kept in mind. The said observations had flown while analyzing the object and the purpose of The Medical Termination of Pregnancy Act, 1971 and the purpose for which it was enacted. The relevant observations read thus:-

> *"31. The cardinal principle of the construction of statutes is to identify intention of the legislature and the true legal meaning of the enactment. The intention of legislature is derived by considering the meaning of the words used in the statute, with a view to understanding the purpose or object of the enactment, the mischief and its corresponding remedy that the enactment is designed to actualize. Ordinarily, the language used by the legislature is indicative of legislative intent. In Kanai Lal Sur v. Paramnidhi Sadhukaran Gajendragadkar, J. (as the learned Chief Justice then was) opined that "the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself." But when the words are capable of bearing two or more constructions, they should be construed in light of the object and purpose of the enactment. The purposive construction of the provision must be "illumined by the goal, though guided by the word. Aharaon Barak opines that in certain circumstances this may indicate giving "an unusual and exceptional meaning" to the language and the words used.*
>
> *32. Before we engage in the exercise of purposive construction, we must caution that a court's power to purposively interpret a statutory text does not imply that a Judge can substitute legislative intent with their own individual notions. The alternative construction propounded by the Judge must be within the ambit of the statute and should help carry out the purpose and object of the Act in question."*

46. Thus, the argument which has been raised as such on behalf of and in order to persuade us to take a restrictive view would go on to show that these provisions only provide the procedure and for restoration of right of the CICL and only would become operational at a subsequent point of time. Rather the specific exclusion of the word "arrest" in the 2015 Act would go on to show that the Legislature as such wanted to provide the protection as the word "apprehension" would be a precursor to the actual "arrest" which may not take place in view of the apprehension and, thus, would be a surplusage in the final write up of the Act keeping in view the

protection which has been mandatorily granted for the grant of bail under Section 12 of the 2015 Act except for the exceptions laid down therein. Thus, the intention of the Legislature seems to be the conscious intention which has not to be read the other way by the Courts to give it a restrictive view. In the absence of any specific bar to the contrary under the Act, which can be for example under Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, we do not subscribe to the view to the contrary by the Courts which have taken a restrictive view. Apparently, keeping in view the benefits which are provided under Rule 8 regarding the prohibition to register a FIR, the word arrest has been consciously deleted so that there would no contradiction as such once the investigating agency is barred from arresting and can only apprehend and detain under the Act and Rules until the offence as such is of a heinous nature.

47. It is not disputed that the Apex Court in ***Arnesh Kumar Jha vs. State of Bihar, AIR 2014 SC 2756,*** has also laid down that there should not ordinarily be arrests for the offences punishable upto imprisonment of 7 years and, therefore, if the intention as such of the 2015 Act is to be kept in mind here to deny the CICL the benefits as such of approaching the Court for the relief of anticipatory bail under Section 438 Cr.P.C. would amount to frustrating the benefits of the legislation. Under Section 18(1)(g) of the 2015 Act, a limitation has also been provided for punishment only within a period of upto three years by the Board regarding a serious offence. In a similar situation, a larger Bench of the Apex Court in case ***Pratap Singh vs. State of Jharkhand, 2005(3) SCC 551***, while dealing with the 1986 Act, had held that the whole object of the Act is to provide for the protection and overall development of the delinquent juvenile and it is a beneficial piece of legislation. It was held that the interpretation of the Statue of such beneficial legislation must be to advance the cause of legislation and not to

frustrate the intendment of the legislation. Paragraph 10 of the said judgment reads as under:-

> *"Thus, the whole object of the Act is to provide for the care, protection, treatment, development and rehabilitation of neglected delinquent juveniles. It is a beneficial legislation aimed at to make available the benefit of the Act to the neglected or delinquent juveniles. It is settled law that the interpretation of the Statute of beneficial legislation must be to advance the cause of legislation to the benefit for whom it is made and not to frustrate the intendment of the legislation."*

48. The gap apparently regarding how a child would be detained or kept prior to his production before the Board can be highlighted from Rule 9 which provides that if a child in conflict with law is apprehended, he shall be produced before the Board within twenty four hours of his being apprehended, along with a report explaining the reasons for the child being apprehended by the police. Thus, a similarly placed co-accused in a case of a heinous offence is entitled for the benefit of the anticipatory bail, whereas CICL is liable to be detained before he is produced before the Board though he is entitled for the grant of benefit of bail. Under Rule 9(4) also, it is provided that where the CICL is not being apprehended and the information in this regard is forwarded by the police to the Board, the Board shall require the child to appear before it at the earliest. Rule 9(6) further provides that in case the CICL is not produced before the Board or a single member of the Board due to child being apprehended during odd hours or distance, the child is to be kept by the Child Welfare Police Officer in the Observation Home in accordance with Rule 69-D of these Rules or in a fit facility and to be produced before the Board thereafter, within twenty-four hours of apprehending the child. Thus, there would arise various situations where the child would have necessarily have to forgoe his

liberty before being produced before the Board on being apprehended and then detained.

CONCLUSION

49. Resultantly, keeping in view the above, ***we are of the considered opinion that the broader view has been laid down*** by the Chhattisgarh High Court in *Sudhir Sharma's case (supra)* and the Calcutta High Court in *Surabhi Jain's case (supra)* and the Aurangabad Division Bench of the Bombay High Court in *Raman's case (supra)* alongwith the judgment of the Allahabad High Court in*Mohammad Zaid'scase (supra)* would be the right way as such to follow. Thus, ***we do not follow the view*** which has been taken by the other High Courts i.e. by the Madras High Court in *K. Vignesh's case (supra)*, the Division Bench of the Madhya Pradesh High Court in *Ankesh Gurjar's case (supra)* and in *Suhana Khatun's case (supra)* by the Calcutta High Court. Resultantly, **we do not approve the views** laid down in ***CRM-M-40284-2017, Ashokpreet Singh @ Showpreet Singh vs. State of Punjab, decided on 20.12.2017; CRM-M-19810-2018, Gurjinder Singh vs. State of Punjab decided on 24.05.2018 and CRM-M-5124-2018, Love @ Aarnav Singh vs. State of Punjab*** whereas, **we approve the view taken in*CRM-M-19907-2020, Krishan Kumar (minor) through his mother vs. State of Haryana decided on 24.07.2020.***

EFFECTIVE PART

50. Resultantly, **interim order dated 08.07.2020 is made absolute** and we direct that the petitioner shall appear before the concerned Juvenile Justice Board in the first week of July, 2024 so that the procedure provided under Section 12 of the 2015 Act can be complied with by the Board. The Investigating Agency as such shall not apprehend or detain the petitioner(s) for the purposes of production before the Board. In the event of apprehension of the petitioner(s) in connection with the

above mentioned FIR, he/she shall be released on interim bail with an undertaking to appear before the Board, as directed above and not detained. Needless to say that if the said order is not complied with, the protection granted herein shall discontinue.

(G.S. SANDHAWALIA)
ACTING CHIEF JUSTICE

29.05.2024
shivani

(LAPITA BANERJI)
JUDGE

Whether reasoned/speaking Yes

Whether reportable Yes