A.F.R.

Court No. - 93

Case :- CRIMINAL REVISION No. - 860 of 2022
Revisionist :- X (Minor)
Opposite Party :- State of U.P. and Another
Counsel for Revisionist :- Birendra Kumar Mishra
Counsel for Opposite Party :- G.A.

Hon'ble Shamim Ahmed,J.

This revision is directed against the judgment and order dated 21.02.2022 passed by Special Judge POCSO Act/Additional District and Session Judge, Varanai dismissing Criminal Appeal No.17 of 2022 (versus State of UP) filed under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'the Act') and affirming the order dated 15.01.2022 passed by Juvenile Justice Board, Varanasi refusing the bail plea to the revisionist in Case Crime No. 195 of 2020, under Sections 147, 149, 302, 307, 323, 324, 354 and 506 I.P.C. Police Station Lohta, District Varanasi.

Sri Diwan Saifullah Khan, learned counsel for the opposite party No.2 submits that he does not want to file counter affidavit. Learned A.G.A. has also not filed counter affidavit.

Heard Sri Birendra Kumar Mishra, learned counsel for the revisionist as well as Sri Vinod Kant, learned Additional Advocate General assisted by Sri Viabhav Aanad, learned A.G.A. for the State, Sri Diwan Saifullah Khan, learned counsel for the opposite party No.2 and perused the record.

Learned counsel for the revisionist submits that the revisionist is named in the F.I.R. allegedly lodged by Gauri Shankar Patel on 07.8.2020 for the incident said to have taken place on 06.8.2020 at

20.30 hours against six named persons including the revisionist and one unknown, with the allegation that Ranjit Kumar (son of the informant) and Mahendra Patel were coming back after attending call of nature and enroute they were ambushed by the named accused persons. Co-accused Kailash Yadav is said to have been armed with axe whereas the revisionist is said to have been armed with lathi and other co-accused persons were also attributed with respective weapons.

Learned counsel for the revisionist further submits that from the F.I.R. it is not clear that there was any precise motive or mental element for committing this offence. A general and sweeping allegation has been fastened against all accused persons, who are said to be the men of having chequered past and criminal antecedents. Besides this, they are also said to be in habit of teasing the womenfolk of the village. This by itself is a sweeping and general allegation against all the named accused persons. All the accused persons have allegedly assaulted and caused injuries to Ranjit Kumar and Mahendra Patel. Injured Ranjit Kumar succumbed to the injuries sustained by him and died on 22.8.2020 after 15 days of the incident.

Learned counsel for the revisionist further submits that during this period no statement of injured Ranjit Kumar was recorded by the police. Postmortem report of the deceased reveals that he has sustained 6 injuries over his person, out of which three are on the vital part of the body (head). It is further contended by learned counsel for the applicant that so far as the allegation of attributing the role of assault upon another injured Mahendra Patel is concerned, his injury report indicates that he has sustained no injury over his persons. Submission of learned counsel for the revisionist is that keeping in view of the generality of allegation, where there is no specification of assault made by assailants over which part of the body of the deceased and it is difficult to decipher to decide as to who is the real author of

fatal injuries sustained by the deceased, under circumstances, the revisionist deserves to be bailed out.

Learned counsel for the revisionist further submits that the revisionist is juvenile and there is no apprehension of reasoned ground for believing that the release of the revisionist is likely to bring him in association with any known criminals or expose him to mental, physical or psychological danger or his release would defeat the ends of justice. He further submits that except this the revisionist has no previous criminal history. The father of the revisionist is giving his undertaking that after release of the revisionist on bail, he will keep him under his custody and look after him properly. Further, the revisionist undertakes that he will not tamper the evidence and he will always cooperate the trial proceedings. There was no report regarding any previous antecedents of family or background of the revisionist. There is no chance of revisionist's re-indulgence to bring him into association with known criminals.

Learned counsel for the revisionist further submits that it is not in dispute that the revisionist is a juvenile as he has already been declared juvenile by Juvenile Justice Board, Varanasi vide order dated 05.03.2021. The revisionist was a juvenile aged 17 Years 3 Months and 19 Days on the date of occurrence. He is in jail since 15.08.2020 in connection with the present crime and has completed substantial period of the sentence out of the maximum three years institutional incarceration permissible for a juvenile, under Section 18(1)(g) of the Act. It is submitted with much emphasis that co-accused Ajay Yadav and Pintu, who are adult and similarly circumstanced as the revisionist, have been admitted to bail by this Court by a common order dated 18.11.2021 passed in Criminal Misc. Bail Application No. 40104 of 2020 and 5403 of 2021 respectively. It is argued that the revisionist being a minor, cannot be held in institutional incarceration any further once co-accused, similarly circumstanced, has been admitted to bail. Further submission is that the case of the revisionist

is not on worse footing than that of the co-accused, therefore on principles of parity also the revisionist be released on bail.

Learned counsel for the revisionist further submits that thereafter the revisionist applied for bail before the Juvenile Justice Board, Varanasi upon which a report from the District Probation Officer was called for. The bail application was rejected vide order dated 15.01.2022, being aggrieved, the revisionist preferred an appeal under Section 101 of the Act, which was also dismissed vide order dated 21.02.2022. Hence the present criminal revision has been filed before this Hon'ble Court mainly on the following amongst other grounds:

(i) That the bail application of the revisionist was rejected by the court below in a very cursory and arbitrary manner.

(ii) That the revisionist, who is juvenile, is wholly innocent and has been falsely implicated by the first informant in the present case.

(iii) That the courts below have not appreciated the report of the District Probation Officer in its right perspective.

(iv) That the impugned judgment and orders passed by the learned courts below are apparently illegal, contrary to law and based on erroneous assumption of facts and law.

(v) That there was absolutely no material on record to hold that the release of the Juvenile would likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or his release would defeat the ends of justice, yet the courts below have illegally, arbitrary and on surmises refused the bail of juvenile.

(vi) That the courts have erred in law in not considering the true import of Section 12 of the Act, 2015 and thus, the impugned orders passed by the courts below suffer from manifest error of law apparent on the face of record.

(vii) That the courts below have acted quite illegally and with material irregularity in not properly considering the case of juvenile in proper and correct perspective which makes the impugned orders passed by the courts below non est and bad in law.

(viii) That bare perusal of the impugned orders demonstrate that the same have been passed on flimsy grounds which have occasioned gross miscarriage of justice.

Several other submissions in order to demonstrate the falsity of the allegations made against the revisionist have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the revisionist that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

Learned counsel for the revisionist has further argued that the revisionist has already undergone substantial period of the imprisonment/institutional incarceration and has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

> *"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."*

Learned counsel for the revisionist has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463,** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

> *"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."*

Learned AGA and learned counsel for the opposite party No.2 have opposed the revisionist's case with the submission that the release of the revisionist on bail would bring him into association of some known criminals, besides, exposing him to moral, physical and

psychological danger. It is submitted that his release would defeat the ends of justice, considering that he is involved in a heinous offence.

This Court has carefully considered the rival submissions of the parties and perused the impugned orders. The juvenile is clearly below 18 years of age and does not fall into that special category of a juvenile between the age of 16 and 18 years whose case may be viewed differently, in case, they are found to be of a mature mind and persons well understanding the consequences of their actions. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

> *"(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:*
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> *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 person's 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.*
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> *(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.*
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> *(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.*
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> *(4) When a child in conflict with law is unable to fulfil 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."*

This Court has, in particular, looked into the role of the various accused and finds that the aforesaid co-accused who has already been granted bail by this Court, and the revisionist have identical role. Once the aforesaid co-accused has been admitted to bail, who is adult, there seems no justification to additionally test the case of the revisionist with reference to the requirements of the proviso to sub Section (1) of Section 12 of the Act. In this connection, I had occasion to consider the question about the right of a juvenile to be released on bail where a similarly circumstanced adult offender had been extended that liberty. In the case of **Dharmendra (Juvenile) vs. State of U.P. and others, [2018 (7) ADJ 864],** the High Court was pleased to observe as under:

> *"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws guaranteed under Article 14 of the Constitution.*
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> *11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It is not the rule about bail in Section 12 of the Act that in case a child in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls is one or the other exceptions, where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except*

the three categories contemplated by the proviso comes into play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso.

12. In the opinion of this Court, therefore, the perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. It is an enduring principle that a construction that lends a statute to challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted. In this context the guidance of their Lordships of the Hon'ble Supreme Court in ***Japani Sahoo vs. Chandra Sekhar Mohanty, (2007) 7 SCC 394*** *may be referred to:-*

"51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or

> *taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution."*

This Court in the case of **Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB)** was pleased to observe that the gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile.

In the present case there appears to be no distinguishing feature from the case of the said co-accused, who is adult offender circumstanced identically as the revisionist. There is no justification to hold the revisionist not entitled to the liberty of bail. It is also taken note of by this Court that the revisionist has by now done substantial period of institutional incarceration. The maximum period for which a juvenile can be incarcerated in whatever form of detention, is three years, going by the provisions of Section 18(1)(g) of the Act. Both the courts below have passed the impugned judgment and orders in cursory manner without placing due reliance on the report submitted by the District Probation Officer as well as facts and circumstances of the case. This Court, thus, finds that the impugned orders cannot be sustained and are liable to be set aside and reversed.

A perusal of the said provision show that bail for a juvenile, particularly, one who is under the age of 18 years, is a matter of course and it is only in the event that his case falls under one or the other disentitling categories mentioned in the proviso to sub-Section

(1) of Section 12 of the Act that bail may be refused. The merits of the case against a juvenile acquire some relevance under the last clause of the proviso to sub-section (1) of Section 12 that speaks about the ends of justice being defeated. The other two disentitling categories are quite independent and have to be evaluated with reference to the circumstances of the juvenile. Those circumstances are to be gathered from the Social Investigation Report, the police report and in whatever other manner relevant facts enter the record.

What is of prime importance in this case is that the juvenile, who is a young boy, less than the age of 18 years, has no criminal history. There is nothing said against the juvenile, appearing from the Social Investigation Report that may show him to be a desperado or misfit in the society. The two courts below have held the juvenile disentitled to bail on account of his case falling under each of the three exceptions enumerated in the proviso to sub section (1) of Section 12, for which no reason has been indicated. That finding, in both the orders impugned, is based on an ipse dixit, in one case of the judge and in the other of the Board. Even if it be assumed that the offence was committed in the manner alleged, it would be rather strained logic to hold that release of the juvenile on bail would lead to the ends of justice being defeated. Both the courts below have also overlooked the statement of the victim recorded under Section 161 and 164 CrPC and further the courts below have also not considered the radiological age of the victim as per the medical report.

After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and the co-accused who are adult have been granted bail by this Court and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum

of Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22** and the view taken by the Hon'ble Court in the cases of **Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra), Dharmendra (Juvenile) vs. State of U.P. and others (supra), Japani Sahoo vs. Chandra Sekhar Mohanty (supra) and Shiv Kumar alias Sadhu Vs. State of U.P. (supra),** this Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail.

In the result, this revision **succeeds** and is **allowed.** The impugned judgment and order dated 21.02.2022 passed by Special Judge POCSO Act/Additional District and Session Judge, Varanai in Criminal Appeal No.17 of 2022 (versus State of UP) and the order dated 15.01.2022 passed by Juvenile Justice Board, Varanasi are hereby set aside and reversed. The bail application of the revisionist stands **allowed.**

Let the revisionist, through his natural guardian/father be released on bail in Case Crime No. 195 of 2020, under Sections 147, 149, 302, 307, 323, 324, 354 and 506 I.P.C. Police Station Lohta, District Varanasi upon his natural guardian furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Varanasi subject to the following conditions:

(i) That the natural guardian/father of the revisionist will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the natural guardian will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his natural guardian/father will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first

Wednesday of April, 2022 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board concerned on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

Order Date :- 21.03.2022

Arvind