

Reserved**A.F.R.****CRIMINAL APPEAL NO. 3625 OF 2008**

Surendra	Appellant
		(In Jail)
	Vs.	
State of U.P.	Respondent

Hon'ble Vinod Prasad, J.**Hon'ble Karuna Nand Bajpayee, J.****(Delivered by the Bench)**

Appellant-applicant Surendra whose 5th bail prayer we are considering by this order was tried for offences under sections 302/364-A/201 I.P.C. by Additional Sessions Judge, Court No. 9, Ghaziabad in S.T. No. 80 of 1998, State Vs. Surendra.

While facing trial appellant, by filing an application for that end prayed before the learned trial Judge that he be declared a juvenile in consonance with the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000, herein after referred to as the Act. For determining appellant's age he was got medically examined and vide CMO's report dated 25.9.2002 he was adjudged 22 years of age. Recapitulated here is the fact that the incident in question had occurred on 14.7.97 and hence, according to the medical examination report appellant was about 16 years and 10 months on the date of commission of the offence. Learned XIII Additional Sessions Judge, who considered the question of appellant's juvenility, vide his order dated 28.8.2002, held that appellant was more than 16 years of age on the date of commission of offence and hence rejected his aforementioned application and /or prayer and resultantly appellant was not declared to be juvenile and his trial proceeded treating him to be an adult and ultimately he was

found guilty of the charged offences and consequently was convicted and sentenced for the aforesaid offences for life imprisonment with fine of Rs. 3,000/- and in default thereof to serve six months RI for the first charge of murder, 10 years RI with fine of Rs. 1,000/- and in default to serve 15 days additional imprisonment and 3 years RI with fine of Rs. 1,000/- and in default of payment of fine to serve 15 days additional imprisonment for rest of the two charges of kidnapping and causing disappearance of evidences of the offence. All the sentences were directed to run concurrently vide judgment and order dated 27.5.2008.

Appellant has challenged impugned judgment of his conviction and sentence in this appeal, which has been admitted for final determination. In the memo of appeal vide ground (K), it was pleaded that appellant was 15 years of age on the date of the incident calculating it from his date of birth mentioned in his Secondary School Examination certificate, wherein it was recorded as 10.2.1982.

At the first instance appellant's bail prayer, u/s 389 Cr.P.C., was considered and rejected on 31.7.2008 as the Bench did not find any reason to grant him bail.

After rejection of the first bail prayer, appellant preferred 2nd bail application, which met with the same fate of rejection on 7.11.2008 by the same Bench.

Not being satisfied with the two earlier rejections, appellant again approached this Court by filing 3rd bail application, which came up for consideration before another Bench. However this time too, the fate of the bail application was the same, as it was rejected on 25.10.2011. We put on record that in the affidavit appended along with this third bail application, appellant had reiterated his plea of juvenility vide paragraph 8 thereof and he has appended his Secondary School examination mark sheet as annexure 1 to support

his claim. Vide para 9 of the same affidavit appellant had also pleaded that another accused Umar Singh was conferred with the benefit of the Act, who was also of the same age. The third rejection was for the reason that earlier two bail applications were rejected on merits and no ground was made out to grant the sought relief.

Dissatisfied with the third rejection appellant had moved 4th bail application which too was rejected on 1.10.2010 by passing the following order—

“First bail prayer was rejected on 31-7-2008 after considering the facts of the case. In the ground ‘K’ of the grounds of appeal this plea was taken that on the date of commission of the crime, age of the accused appellant was 15 years and he was juvenile. Since the plea of juvenility was there in the grounds of appeal it shall be deemed that the same was considered by the court while deciding the first bail, prayer on 31-7-2008.

So far as second bail application is concerned, it was decided on 7-11-2008 and in the second bail application as well, this plea taken that the appellant was juvenile at the time of commission of crime. This plea shall also deemed to have been considered and rejected while disposing of the second bail application of the accused appellant.

So far as third bail application is concerned, it was dismissed in default.

In the fourth bail application same plea of juvenility has been taken and as such there is no new ground in the fourth bail application. The same is therefore rejected.”

Above is the background for filing this 5th bail application by the appellant seeking his release on bail which we are considering after being nominated by Hon’ble The Chief Justice.

Sri Vikrant Rana, learned counsel was heard in support of the

bail prayer of the appellant and learned AGA in opposition.

Sri Rana strenuously urged before us that on all the preceding occasions this court has rejected appellants plea of juvenility de hors the provisions of the Act, which mandates all the courts to conduct an inquiry into the question of juvenility of a juvenile in conflict with law whenever the said plea is raised. Section 7 and 7-A of the Act, both postulates conducting of such an inquiry which cannot be dispensed with or eschewed as the same is statutorily mandatory. Since that has not been observed on all the previous occasions, rejection of bail prayer of the appellant at all those stages are illegal, de-hors the procedure prescribed under the law and therefore appellant be declared a juvenile and be released on bail.

Learned AGA reiterate the same contention that there is no new ground to grant the relief sought for and on all the earlier occasions the plea of being a juvenile was raised, considered and rejected and hence the same contention cannot be permitted to be reverberated and harangued time and again. He therefore vehemently opposed grant of bail to the appellant.

We have pondered over rival submissions and have perused various provisions of the Act. Since we propose to take a contrary view from our predecessor Benches and depict existence of a new point in deciding appellant's prayer for bail, and since there is little cause left for procrastination, therefore, we exhibit our view through this order in some detail taking note of various relevant provisions of the Act.

Juvenile Justice (Care and Protection of Children) Act, 2000 was promulgated on 30.12.2000 after being published in Gazette of India, Extra., Part II, Section1, but was infused with life and enforced w.e.f. 1.4.2001 vide S.O.177(E), dated 28th February 2001, published in Gazette Of India, Extraordinary, Pt.II,Sec.3(i),No.88 dated 1st March 2001. The Act provides –

"Short title, extent, commencement and application-(1)

This Act may be called the Juvenile Justice (Care and Protection of Children) Act, 2000.

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(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law."

The aims and object which the Act seeks to achieve are "to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment".

Section 2(k) of the Act defines "juvenile" or "Child" as –

"Juvenile" or "child" means a person who has not completed eighteen years of age;"

Sections 7 and 7-A of the Act, mandating determination of juvenility of a person raised at any stage of the proceedings, even after culmination of the case, by conducting an inquiry into that aspect, are reproduced herein below:-

"7. Procedure to be followed by a Magistrate not empowered under the Act.-(1) When any Magistrate not empowered to exercise the powers of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile or the child, he shall without any delay record such opinion and forward the juvenile or the child and the

record of the proceeding to the competent authority having jurisdiction over the proceeding.

(2) The competent authority to which the proceeding is forwarded under sub-section (1) shall hold the inquiry as if the juvenile or the child had originally been brought before it:

7-A. Procedure to be followed when claim of juvenility is raised before any court.- *(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be :*

Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-Section (1), it shall forward the juvenile to the Boards for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.

(underline emphasis ours)

A joint reading of both the sections leaves no manner of doubt and makes it manifest or indubitable that whenever a plea of juvenility is raised by 'a person' before 'any court' or 'a court', an inquiry into that question of juvenility, in accordance with the procedure prescribed under the Act, is indispensable which cannot be overlooked. The preposition of law that 'if a thing is required to

be done in a particular manner then either it should be done in that manner or not at all' is too well settled to be ignored. The fallout of this trite law is that no person can be determined to be a juvenile or otherwise unless an inquiry into that aspect has been conducted by 'a court' or by 'any court' in consonance with the procedure established under the Act or the Rules made thereunder. The natural corollary therefore is that if a person has been declared to be a juvenile or otherwise without conducting an inquiry into that aspect in accordance with the provisions of the Act or the rules made thereunder, then that determination will not be damnum and will be wholly illegal de hors observing due process clause established by the law. Sections 14 and 49 of the Act and other sections re-emphasizes conducting of an inquiry for such a determination.

Furthermore, Rule 12 of the Rules made under the Act provides for the procedure to be observed while conducting an inquiry under the Act to determine juvenility of a person. It provides

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"12. Procedure to be followed in determination of Age.-
(1) In every case concerning a child or a juvenile in conflict with law, the Court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or, as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court

or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a) (i) the matriculation or equivalent certificates, if available, and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of Clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the Clauses (a)(i), (ii), (iii) or in the absence whereof, Clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule(3), the Court or the Board or as the case may be Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions concerned in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

Attour, since the Act is a beneficial legislation aiming to achieve above objective, therefore in it's applicability , scope and ambit, it takes into it's fold not only pending cases but even those cases, which have been finally determined. In this connection Rule 97 of Juvenile Justice (Care and Protection of Children) Rules 2007 postulates as under:-

"Pending cases-(1) No juvenile in conflict with law or a child shall be denied the benefits of the Act and the rules made thereunder.

(2) All pending cases which have not received a finality shall be dealt with and disposed of in terms of the provisions of the Act and the rules made thereunder.

(3) Any juvenile in conflict with law, or a child shall be given the benefits under sub-rule (1) of this rule, and it is hereby clarified that such benefits shall be made available to all those accused who were juvenile or a child at the time of commission of an offence, even if they cease to be a juvenile or a child during the pendency of any inquiry or trial.

(4) While computing the period of detention or stay or sentence of a juvenile in conflict with law or of a child, all such period which the

juvenile or the child has already spent in custody, detention, stay or sentence of imprisonment shall be counted as a part of the period of stay or detention or sentence of imprisonment contained in the final order of the Court or the Board."

A Joint reading of the aforesaid sections and the rule leaves no room for doubt that the Act engulfs into its folds all juveniles in conflict with law or a child and the benefit of the Act has to be conferred on them. For fulfilling the aims and objects, the Act has been given overriding effect. Section 1(4) lays down as under-

"(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law."

Section 3 of the act provides *"where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection and during the course of such inquiry the juvenile or the child ceases to be such, the, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may continue and orders may be made in respect of such person as if such person had continued to be a juvenile or a child."*

So also section 4 of the Act starts with a non obstante clause by ordaining that *"notwithstanding anything contained in the Code of Criminal procedure, 1973 (2 of 1974), -----"*.

Thus, primacy of the Act has been well recognized by the legislature over other statutes.

Applying the aforesaid law on the appellant, it emerges from the facts and circumstances of the case, that as an under trial appellant had raised the plea of his being a juvenile. His plea was entertained and a scanty inquiry into that aspect was conducted by the learned trial Judge who concluded vide his order dated 28.8.

2002, the date on which the Act was in force, by holding that- "*Age of accused Surendra was more than 16 years on the date of the incident and he was not sick. Resultantly his application is rejected and he has to be tried by this court. Consequently case be fixed on 7.11.2002 for evidence.*" Such a determination of appellant's age and non- conferment of benefit of the Act on him , thus was wholly illegal as learned trial Judge never judged him to be a juvenile in conflict with law above eighteen years of age. No order or finding to such an effect has been recorded by the learned trial Judge. Here we hasten to recapitulate that on the date when learned trial Judge held as above, Act was already in vogue and definition clause under section 2(k) stood satisfied. In our opinion, therefore, learned trial Judge has committed an *ex facie* error in refusing to grant benefit of the Act to the appellant.

Now turning towards post- conviction proceedings in this appeal, we have already inked raising of plea of being a juvenile by the appellant for seeking release on bail and various orders passed by this court refusing to grant the said relief, but what is significant to note is that even this court did not confer him the benefit of the Act nor directed an inquiry to be conducted into the question of appellant's juvenility and without adhering to the due process of law, on all the earlier four occasions, appellant was denied bail although till date there is no finding that he was a juvenile in conflict with law above eighteen years of age on the date of commission of the offence. At this juncture we would like to reproduce section 6 of the Act, with especial emphasis on section 6(2) thereof, which is as follows:-

"6. Powers of Juvenile Justice Board.- (1) *Where a Board has been constituted for any district, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act,*

have power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law.

(2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise."

In our humble view with utmost respect, therefore, we find that appellant's submissions that all the previous rejection orders do not have any legal sanction is not without substance and is a well merited contention. We are also of the opinion that juvenility of the appellant has to be determined in accordance with the provisions of Juvenile Justice Act. Section 10 of the Act along with its proviso forbids keeping a juvenile in conflict with law in jail. It provides:-

" Section 10. Apprehension of Juvenile in conflict with law –

(1)As soon as a juvenile in conflict with law is apprehended by police, he shall be placed under the charge of the special juvenile police unit or the designated police officer , who shall produce the juvenile before the Board without any loss of time but within a period of twenty-four hours of his apprehension excluding the time necessary for the journey, from the place where the juvenile was apprehended, to the Board:

Provided that in no case, a juvenile in conflict with law shall be placed in a police lockup or lodged in jail."

In matters of Bail to a juvenile in conflict with law section 12 of the act lays down-

"12. Bail of juvenile.- (1) When any person accused of a bailable or non bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before 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 institution or fit person] but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

(2) When such person having been arrested is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.

(3).When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

In this connection section 16 of the Act is also relevant, which provides-

"16. Order that may not be passed against juvenile.-(1)
Notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death or [or imprisonment for any term which may extend to imprisonment for life], or committed to prison in default of payment of fine or in default of furnishing security :

Provided that where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order

the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government.

(2) On receipt of a report from a Board under sub-section (1), the State Government may make such arrangement in respect of the juvenile as it deems proper and may order such juvenile to be kept under protective custody at such place and on such conditions as it thinks fit :

Provided that the period of detention so ordered shall not exceed in any case the maximum period provided under section 15 of this Act”.

It is to be noted that unlike Cr.P.C. this section 12 does not make any distinction between bail u/s 436 to 439 Cr.P.C. and u/s 389 Cr.P.C. and applies to both the situations in the same manner with equal force. There is no separate provision for bail in matters of juvenile in conflict with law post his conviction, if he was not declared a juvenile as an under trial and he makes such a plea in appeal or revision.

Not only as above but Rule 64 of the Rules framed under the Act goes forward and provides as under-

"64. Juvenile in conflict with law undergoing sentence at commencement of this Act.-In any area in which this Act is brought into force, the State Government shall direct, that a juvenile in conflict with law who is undergoing any sentence of imprisonment at the commencement of this Act, shall, in lieu of undergoing such sentence, be sent to a special home or be kept in fit institution in such manner as the State Government thinks fit for the remainder of the period of the sentence; and the provisions of this Act shall apply to the juvenile as if he had been ordered by the Board to be sent to such special home or institution, or, as the case may be, ordered to be kept under protective care under sub-section

(2) of Section 16 of this Act.

Provided that the State Government, or as the case may be the Board, may, for any adequate and special reason to be recorded in writing, review the case of a juvenile in conflict with law undergoing a sentence of imprisonment, who has ceased to be so on or before the commencement of this Act, and pass appropriate order in the interest of such juvenile.

Explanation.-In all cases where a juvenile in conflict with law is undergoing a sentence of imprisonment at any stage on the date of commencement of this Act, his case including the issue of juvenility, shall be deemed to be decided in terms of clause (1) of Section 2 and other provisions contained in this Act and the rules made thereunder, irrespective of the fact that he ceases to be a juvenile on or before such date and accordingly he shall be sent to the special home or a fit institution, as the case may be, for the remainder of the period of the sentence but such sentence shall not in any case exceed the maximum period provided in Section 15 of this Act."

In view of above discussions we are of the considered opinion that earlier rejections of the bail prayer of the appellant were without following the required mandatory procedure established by law and hence that cannot divest us from reconsidering bail prayer of the appellant afresh. In what we have said herein above plea of juvenility raised by the appellant is still a nascent and fresh ground which has not been considered till date in accordance with the procedure established by law.

Wrapping up this order while directing an inquiry into the question of juvenility of the appellant Surendra by the learned trial Judge, court no. 9 Ghaziabad, to be concluded within a period of two months from today, we direct the release of the appellant on short term bail (parole) during interregnum period.

Let appellant Surendra be released on short term bail (parole) on his father furnishing a personal bond of Rs. 2 lacs with two solvent sureties of his family members and /or relatives in the like amount to the satisfaction of trial Judge concerned. Short term bail (parole) of the appellant shall start from 6th September 2013, on which date appellant shall be released from jail on filing of personal and surety bonds as above. His parole will lapse on 21st October 2013 on which date appellant shall surrender before the trial court who will remand him to judicial custody. Appellant's father is directed to keep a watch over the appellant and will not allow him to indulge into any criminal activity. He is also directed to file an affidavit affixing his and appellants photographs before the learned trial Judge testifying there under that he will not permit the appellant to change his residence without permission of the trial court and will produce the appellant before the trial court as and when required by it and in any case once in two weeks.

Learned trial Judge/Additional Sessions Judge, court no.9, Ghaziabad, will conduct the inquiry to determine juvenility of the appellant in accordance with the provisions of the Juvenile Justice Act, 2000 and submit his report to this Court within the aforesaid period of two months.

List the appeal in the cause list for further orders after expiry of two months, on 25th October 2013 along with trial court's report.

Let a copy of this order be communicated to the trial court, through Sessions Judge, Ghaziabad immediately for follow up action and report.

Dt.2.9.2013
Arvind/-