2019 INSC 753

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(s). 1890 OF 2011

PRATAP SINGH @ PIKKI .....**Appellant(s)**

VERSUS

STATE OF UTTARAKHAND .....**Respondent(s)**

J U D G M E N T

Rastogi, J.

1. The appellant(accused no. 1) along with three others tried for an offence under Sections 147, 148, 302/149 and 323/149 of the Indian Penal Code(hereinafter being referred to as "IPC"). The appellant and one Vikas Kirola were convicted under Section 304 Part II/34 IPC and sentenced to undergo rigorous imprisonment for 10 years and other two persons Manoj Singh Rautela and

Deepak Pathak were acquitted vide judgment dated 12th January, 1998.

2. Both the unsuccessful convicted persons preferred criminal appeal against the judgment dated 12th January, 1998 before the High Court of Uttarakhand. In the case of appellant, the High Court observed that according to his marksheet of Secondary School Certificate Examination 1993, his date of birth is 13th June, 1977 while the incident was of 18th June, 1995 and he was not a juvenile on the date of the incident. At the same time, Vikas Kirola, whose date of birth was 26th December, 1977 on the basis of his secondary school certificate was given the benefit of Juvenile in view of Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 and their conviction under Section 304 Part II/34 IPC came to be confirmed vide impugned judgment of the High Court dated 9th November, 2010 which has been challenged by the appellant in the instant appeal.

3. The facts in brief which are essential to be stated for adjudication of this appeal are that complainant Mukesh Sah(PW-1) lodged FIR stating interalia that on 18th June, 1995,

his cousin brother Rajesh Sah had gone to see Jagjit Singh night at Mallital, Nainital. At about 10.30 PM, Manoj Joshi, friend of Rajesh Sah, had come and informed that some boys had committed Marpit with his brother(Rajesh Sah) near the flat and his situation was serious and was admitted to B.D. Pandey Hospital. On this information, the complainant immediately rushed to B.D. Pandey Hospital and saw that his brother Rajesh was in operation theatre. When his brother was brought out, he was unconscious and after some time at about 12.25 AM, he succumbed to his injuries. He also came to know that in the Marpit committed with his brother, Harshwardhan Verma, Sanjay Goswami and Deepak Verma also sustained injuries. He further came to know that in Jagjit Singh night, his brother(Rajesh Sah) along with Harshvardhan Verma, Deepak Verma, Pankaj Verma, Sanjay Goswami and Tanmay Tiwari @ Fatty were there and on their next row, some girls were sitting to whom some boys were passing indecent remarks. Complainant's brother Rajesh stopped those boys not to do so, on which one of those boys slapped Rajesh and gone from there by threatening to see him. When Jagjit Singh night was going to end and the people were coming out of it, Rajesh Sah along with his friends

proceeded towards his house and near the fountain at about 10.00 PM in the night, 5-6 boys assaulted Rajesh by lathis-dandas. After sustaining injuries, Rajesh fell down on the earth but even then, those persons continued beating him. Some of the companions of Rajesh, namely, Harshvardhan Verma, Deepak Verma and others tried to intervene, who too sustained injuries. Injured Rajesh was then immediately brought to B.D. Pandey Hospital. The persons accompanying Rajesh informed the names of accused as Pratap Singh Bisht, Vikas Kirola, one Pathak and also about 2-3 other boys, however, their names were not known.

4. On the said complaint, FIR (Exhibit Ka-1) was lodged by PW-1 Mukesh Sah on 19th June, 1995 at 1.20 AM at P.S. Mallital, Distt. Nainital. Injured Rajesh Sah was primarily medically examined on 18th June, 1995 at 10.10 PM by PW-5 Dr. Rajeev Kumar, who after the examination, prepared injury report (Exhibit Ka-3). Similarly injured Harshvardhan Verma was examined at 1.10 AM on 19th June, 1995 and his injury report (Exhibit Ka-4) was prepared. Injured Sanjay Goswami was examined on 19th June, 1995 at 1.15 AM and his injury report

(Exhibit Ka-5) was prepared. Likewise, injured Deepak Verma was examined on 19th June, 1995 at 1.20 AM and his injury report (Exhibit Ka-6) was also prepared by the same medical officer. In the intervening night of 18th/19th June, 1995 at about 12.30 AM, injured Rajesh Sah succumbed to his injuries and autopsy on the dead body was conducted on 19th June, 1995 at 11.45 AM and post-mortem report (Exhibit Ka-2) was prepared by PW-4 Dr. J.P. Bhatt. On 19th June, 1995, inquest of his dead body was conducted by the I.O. and inquest report (Exhibit Ka-8) was prepared. The Investigating Officer during the course of investigation, recorded the statements of the witnesses and on completing the investigation, he filed the charge sheet (Exhibit Ka-14).

5. The following injuries were found on the body of the deceased:-

1. Traumatic Swelling present over left tempora – parieto – occpital region size 15 cm X 12 cm. On cutting clotted blood present in the sub-cut tissues.

2. Stitched wound size 5 cm long on left side parietal region 3 cm away from midline. On cutting clotted blood present in the subcutaneous tissues.

3. Stitched wound size 4.5 cm long on left side parietal region, 1 cm medial and posterior to injury no. 2.

4. Stitched wound 7 cm long on left side on parieto occipital region 1 cm medial and posterior to injury no. 3.

5. Lacerated wound size 7 cm X 1 cm X bone deep present over left parieto- occipital region 10 cm above and posterior to upper brain of left pinna of ear. Underlying bone is fractural, Dark coloured blood is coming out on removing the guaze packing. On cutting injury no. 3, 4 and 5, clotted blood present in the subcutaneous tissues. Injury no. 2 to 5 are present over injury no. 1. All the injuries above-mentioned are dressed and bandaged.

6. Lacerated wound 1 cm X .3 cm X bone deep on the occipital bone over skull (Top of Skull) present slightly right of midline. On cut, clotted blood is present in the subcutaneous tissues.

7. Abrasion 1.5 cm X .5 cm present obliquely downwards on the right side face 1 cm below outer aspect of right eye. On cutting clotted blood is present in the subcutaneous tissues.

8. Contusion 6 cm X 4 cm on the dorsum of left hand with a lacerated wound 2.5 cm X 1 cm X muscle deep just above 2nd knuckle and two abrasions of .5 cm X .5 cm each on the lateral aspect of the contusion. On cutting clotted blood is present in the subcutaneous tissues.

9. Abraded contusion 12 cm X 6 cm over back of left upper arm in its middle portion. On cutting, clotted blood is present.

10. Abraded contusion 6 cm X 4 cm on the front of left side of chest 6 cm below left nipple at 5 o' clock position. On cutting clotted blood present in the subcutaneous tissues.

11. Abraded contusion 2 cm X 1 cm on the back in the lower region 1 cm to the left of midline. On cutting clotted blood is present on the subcutaneous tissues.

6. After receiving the charge sheet, CJM, Nainital committed the case to the Court of Sessions after giving necessary copies to the accused persons as required under Section 207 CrPC.

Charges were framed against the appellant along with other persons under Sections 147,148, 302/149 and 323/149 IPC.

7. The prosecution of the case examined PW-1 Mukesh Sah(complainant), PW-2 Sanjay Goswami (injured eyewitness), PW -3 Harshvardhan Verma (injured eyewitness), PW -4 Dr. J.P. Bhatt, Radiologist who conducted the post mortem, PW -5 Dr. Rajiv Kumar, who examined the injuries on the body of deceased and that of injured witness and PW -6 SI Prem Singh, IO of the case.

8. The accused appellant in his statement under Section 313 CrPC denied the allegations and stated that he was falsely implicated in the case.

9. After hearing learned counsel for the parties, Sessions Judge held the appellant along with Vikas Kirola guilty for the offence under Section 304 Part II/34 IPC and sentenced both of them to 10 years rigorous imprisonment vide judgment dated 12th January, 1998 and the conviction and sentence of the appellant

came to be confirmed by the High Court on dismissal of the appeal under the impugned judgment dated 9th November, 2010.

10. The main thrust of the submission of Mr. Siddharth Luthra, learned senior counsel for the appellant is that there is a sole testimony of PW-3 Harshvardhan Verma on record. The statement of PW-2 Sanjay Goswami cannot be read into evidence because the opportunity of cross-examination had not been provided to the defence. The examination in Chief of PW-2 Sanjay Goswami was recorded on 27th March, 1997. On that day, the cross was deferred and later on, it was not possible for the prosecution to produce him for cross examination as he died on 30th March, 1997. Thus, the solitary statement of the prosecution witness of PW-3 Harshvardhan Verma has not been corroborated by any other evidence on record and on his sole testimony, he could not be held guilty and it is the manifest error which has been committed by both the Courts below and needs to be interfered with by this Court.

11. Learned counsel further submits that the appellant obtained a birth certificate from the competent authority on 14th

September, 2010 in which his recorded date of birth is 28th June, 1977 and he too was juvenile on the date of incident, i.e. 18th June, 1995 and in support of the certificate (P-10-page 101 of the paper book), application was filed under Section 391 CrPC that has not been properly considered by the High Court while dismissing the appeal preferred by him under the impugned judgment dated 9th November, 2010.

12. Mr. Jatinder Kumar Sethi, learned Deputy A.G. appearing for the respondent, in support of the finding recorded by both the Courts further submits that the submission made is nothing but a reiteration of what being considered by the trial Judge and also by the High Court in detail needs no further indulgence by this Court.

13. We have heard learned counsel for the parties and with their assistance perused the evidence adverted by the Courts below to examine the finding of guilt which has been recorded against the appellant(A-1) under the impugned judgment.

14. After careful consideration of the evidence of PW-3 Harshvardhan Verma who himself is an injured eye-witness and made a statement in his deposition that he was one of them who accompanied the deceased Rajesh Sah, were sitting on the chairs and looking the programme of Jagjit Singh night. On the next row, some girls were sitting, to whom some boys were passing indecent remarks. Deceased Rajesh Sah stopped them not to do so and in course of time, some altercation and after that a scuffle took place. The police persons intervened and stopped the scuffle at about 9.30 PM. After Rajesh Sah and his friends saw the program and moved towards the fountain and on the way, the road leading towards the main road, some boys met them, out of whom, Pratap Singh Bisht, Deepak Pathak, Manoj Rautela and Vikas Kirola were identified by him. When Rajesh Sah(deceased) proceeded to talk to those persons, the accused assaulted Rajesh Sah with dandas and due to the injuries sustained by him, he fell down, however, even then the accused persons including appellant(A-1) continued to beat him. He tried to intervene but he too was beaten and was injured by the accused persons. On seeing the accumulation of crowd, the appellant(A-1) ran away. After that, Rajesh Sah was brought to the hospital, however, he

became unconscious before reaching the hospital and blood was oozing from his head and succumbed to injuries at 12.30 AM in the night.

15. PW-2 Sanjay Goswami who too was injured eye-witness of the incident supported the case of the prosecution and examination-in-chief was recorded on 27th March, 1997. On that day, the cross was deferred on the application of the accused but later on 30th March, 1997 unfortunately he died and it was not possible for the prosecution to produce him for cross-examination.

16. The presence of PW-3 Harshvardhan Verma cannot be doubted. The medical evidence supports the prosecution story including his injury report, supported by the post-mortem report of deceased (Rajesh Sah) furnished by PW-4 Dr. J.P. Bhatt. We are of the considered view that the evidence of PW-3 Harshvardhan Verma is reliable, believable and inspire implicit confidence as well as the corroboration of statement of PW-2 Sanjay Goswami.

17. The appellant in his statement under Section 313 CrPC did not produce any evidence in support of his defence and made a bald statement. The involvement of the accused appellant(A-1) has been established by the deposition of PW-3 Harshvardhan Verma, the injured eye-witness. After going through the records of the case, we find no reason to deviate from the concurrent view taken by the two Courts below and finding of guilt recorded against the appellant being in conformity with the evidence produced by the prosecution and the order of conviction of the appellant for offence under Section 304 Part II/34 IPC needs no interference by this Court.

18. The submission of the learned counsel for the appellant is that he was a juvenile on the date of incident and his date of birth as per the birth certificate issued on 14th September, 2010 was 28th June, 1977 which was not properly appreciated by the High Court in passing the impugned judgment. The submission is without substance for the reason that documentary evidence has come on record that the appellant passed out his Secondary School Examination in the year 1993 from CBSE and marksheet was issued to him by the Education Board on 5th June, 1993 in

which his recorded date of birth is 13th June, 1977. In 1995, he passed out his Senior School Certificate Examination from CBSE, his recorded date of birth is 13th June, 1977 which clearly establishes that he was more than 18 years of age by few days on the date of incident, i.e. 18th June, 1995.

19. The strength of the appellant's case is that birth certificate issued to him by the competent authority dated 14th September, 2010 recorded his date of birth as 28th June, 1977 which shows that he was less than 18 years of age on the date of incident. Taking note of the later birth certificate issued by the competent authority which was obtained by him on 14th September, 2010, this Court vide its Order dated 9th January, 2019 directed the appellant to file copy of the affidavit which was filed by him before the competent authority on the basis of which birth certificate was obtained by him on 14th September, 2010 with liberty to the learned counsel for the State also to file affidavit of the concerned Officer to place on record the factual position about the genuineness of the stated birth certificate, if so required.

20. In compliance of the Order of this Court dated 9th January, 2019, the appellant has placed on record the application under RTI furnished by him obtaining the affidavit and other documents which he furnished on which the date of birth certificate was issued to him by the competent authority dated 14th September, 2010. In response to the RTI application, he was informed that such record on transportation has been missed somewhere and is not available. It goes without saying that it is the appellant who furnished the relevant documentary evidence before the competent authority on which a birth certificate was issued to him on 14th September, 2010. No supporting evidence has been placed on record to justify the later birth certificate obtained by him in absence thereof, no credence can be attached to it. At the same time, under the scheme of Juvenile Justice(Care and Protection of Children) Act, 2000, it clearly manifests that the age of juvenility prior to Act, 2000 was 18 years but the law having changed, with retrospective effect one can always claim benefit of juvenility.

21. It has been settled that the person below 18 years at the time of incident can claim benefit of Juvenile Justice Act at any

time and taking note of the scheme of the Act and Rule 12 of the Juvenile Justice(Care and Protection of Children) Rules, 2007 in particular, it lays down the procedure in determination of age.

22. The relevant rule is as under:-

> "**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.
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> (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.
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> (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—
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>> (*a*)(*i*) the matriculation or equivalent certificates, if available; and in the absence whereof;
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>> (*ii*) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
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>> (*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,
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> 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 the 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 contained 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."

23. In terms of the scheme of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007, the committee constituted has been entrusted to hold inquiry by seeking evidence in support of the respective claim has to first consider if there is a matriculation certificate available, in the first instance. In absence thereof, the date of birth certificate from the school (other than the play school) first attended; and in absence, the birth certificate given by the Corporation or a Municipal Corporation or a Panchayat in the descending form has to be considered as the basis for the purpose of determination of age of the juvenile.

24. In the instant case, admittedly, the secondary school certificate was issued to the appellant in the year 1993 on 5th June, 1993 in which his recorded date of birth is 13th June, 1977. In the given circumstances, when the appellant has failed to place any supporting material on record while obtaining the date of birth certificate at the later stage on 14th September, 2010, the reliable evidence on record can be discerned from his own certificate issued by the statutory board(CBSE) from where

he passed out Secondary and Senior School Examination in the year 1993 and 1995 where his recorded date of birth is 13th June, 1977. In the given circumstances this Court is clear in its view that the appellant was not a juvenile and has crossed the age of 18 years by few days on the date of incident, i.e. 18th June, 1995 and the protection of the Juvenile Justice Act was not available to him.

25. Learned counsel for the appellant alternatively requests that the sentence awarded to the appellant is excessive and the incident is of June, 1995 with no previous criminal record and the appellant was also just at his tender age and undoubtedly, the incident took place on the spur of moment without any pre-meditation and by passage of time, he has settled with his family who are dependent on him and at least the sentence awarded to him needs interference by this Court which has neither been looked into by the trial Court nor considered by the High Court while dismissing the appeal in the instant proceedings.

26. To examine the question of sentencing, we refer the decision of this Court in ***Gopal Singh*** ***Vs.*** ***State of Uttarakhand*** 2013(7)

SCC 545 which eloquently laid down the principles of proportionality of sentencing policy. The relevant paras are stated as under:-

> "**18.** Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect — propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should

> not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.
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> **19.** A court, while imposing sentence, has to keep in view the various complex matters in mind. To structure a methodology relating to sentencing is difficult to conceive of. The legislature in its wisdom has conferred discretion on the Judge who is guided by certain rational parameters, regard been had to the factual scenario of the case. In certain spheres the legislature has not conferred that discretion and in such circumstances, the discretion is conditional. In respect of certain offences, sentence can be reduced by giving adequate special reasons. The special reasons have to rest on real special circumstances. Hence, the duty of the court in such situations becomes a complex one. The same has to be performed with due reverence for the rule of law and the collective conscience on one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical rationality sans any kind of personal philosophy or individual experience or any a priori notion."

27. We do find substance in what being submitted by the learned counsel for the appellant and in the first place, it is to be noted that the trial Court, while awarding sentence to the appellant has not made any analysis of the relevant facts as can be discerned from the judgment (page 96-97 of the paper book) dated 12th January, 1998. Even the High Court has not considered the issue of quantum of sentence. From the factual position which emerge from the record, it is to be noticed that they were young boys having no previous enmity and were collectively sitting and watching Jagjit Singh night. On some

comments made to the girls sitting in front of the deceased, some altercation took place and they entered into a scuffle and without any pre-meditation, the alleged unfortunate incident took place between two group of young boys and it is informed to this Court that the appellant has served the sentence of more than three years and five months. Taking into consideration in totality that the incident is of June 1995 and no other criminal antecedents has been brought to our notice, and taking overall view of the matter, we find force in the submission of the appellant that the quantum of sentence is excessive and deserves to be interfered by this Court.

28. Considering the overall facts of the case in totality with the nature of crime, the tender age of the appellant at the time of offence, subsequent conduct and other ancillary circumstances, including that no untoward incident has been reported against him and the mitigating circumstances, it is appropriate that in the obtaining factual score, the sentence of rigorous imprisonment be altered to the period already undergone for offence under Section 304 Part II/34 IPC, to meet the ends of justice.

29. The appeal is allowed to the extent indicated above.

30. Pending application(s), if any, stand disposed of.

…………………………..J.
(A.M. KHANWILKAR)

…………………………..J.
(AJAY RASTOGI)

New Delhi
July 12, 2019