

(12) Before closing the judgment, I must, in fairness of the learned counsel for the respondents in Criminal Misc. No. 5033-M of 1984, notice that he made an effort to justify the maintenance of the bail order on merits on the anvil of the provisions of the Ordinance/Act, but as said earlier, it would be appropriate for the respondents to approach the Special Court for the purpose in the first instance. Ordered accordingly.

N.K.S.

Before J. M. Tandon, J.

JOGINDER PAL,—Petitioner.

versus

STATE OF PUNJAB,—Respondent.

Criminal Miscellaneous No. 2090-M of 1984

September 25, 1984

East Punjab Children Act (XXXIX of 1949),—Sections 3(c), 34, 35, 42 and 43—Child found guilty of murder—Court reporting his case to the State Government for orders—State Government under section 34(2), ordering detention of the child in a Certified School till the age of 18 years—Child also ordered to be detained in the Borstal School after he attained the age of 18 years—Detention of the child after the age of 18 years—Whether legal—Proviso to Section 43(2)—Whether applicable.

Held, that the limit of 18 years for detention of a child prescribed under Section 43(2) read with Section 42 of the East Punjab Children Act, 1949 cannot be extended to a child transferred to the Borstal School in pursuance of an order passed by the State Government under Section 34(2). The proviso to Section 43(2) shall apply only where the child had been sent to the Certified School by the Court under Section 35(e). The power of the State Government under section 34(2) of the Act to order the detention of the child beyond the age of 18 years in a Borstal School does not stand curtailed by ordering his detention in a Certified School till he attained the age of 18 years. The Court trying a child can direct that he be detained in a Certified School under section 35(e) of the Act. The child can be detained in a Certified School by the Court till he attains the age of 18 years. After the child so detained

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in a Certified School has attained the age of 16 years he can be transferred to the Borstal School by the State Government under Section 43(2). The proviso to section 43(2) will apply only to a case in which the child has been sent to a Certified School by the Court under Section 35(e) and the State Government in exercise of powers under Section 43(2) transfers him to a Borstal School after he attains the age of 16 years. The proviso to section 43(2) shall have no application where a child is ordered to be detained in a Certified School but by the State Government under Section 34(2) of the Act.

(Paras 10 and 11).

Petition under section 72(3)/73 of the East Punjab Children Act, 1949 read with section 482 of the Code of Criminal Procedure praying that the entire record concerning the case of the petitioner be summoned and after the perusal of the same, the impugned order, Annexure P.3 passed by the Government on 7th January, 1982 may be quashed and the Government may be ordered to pass suitable orders under the Act or in the alternative the order passed by the Government, Annexure P.3, be suitably amended so that it may fulfil the requirement of East Punjab Children Act, 1949.

Any other order which in the circumstances of this case, this Hon'ble Court deems fit and proper be also passed.

Filing of an affidavit in support of the present petition be dispensed with as the petitioner is confined behind the bars.

Filing of certified copies of Annexures be dispensed with.

Costs of the petition be awarded to the petitioner.

V. K. Jindal, Advocate, for the Petitioner.

D. S. Brar, Assistant Advocate-General, Punjab.

JUDGMENT

J. M. Tandon, J.:

(1) The petitioner was convicted under section 302, Indian Penal Code, by the Additional Sessions Judge, Amritsar,—*vide* order, dated May 28, 1981, and sentenced to imprisonment for life and a fine of Rs. 5,000, in default of payment further rigorous imprisonment for two years,—*vide* another order, dated May 29, 1981. The petitioner filed Criminal Appeal No. 400-DB of 1981 which

was disposed of on November 9, 1981. The operative part of this order reads :—

“So far as Joginder Pal appellant is concerned, he was aged 14 years at the time of the occurrence. He had given this age at the time of his examination under section 313, Code of Criminal Procedure. He produced a photostat copy of his birth entry to show that his date of birth was 31st August, 1966. However, the learned Judge mistakenly attributed this statement and applied the evidence to Rana. He held that Rana was a child instead of holding that Joginder Pal was a child at the time of incident.

Joginder Pal is a first offender. There was nothing to suggest that he is so unruly or of so depraved a character that he is not a fit person to be sent to a Certified School. The provisions of section 27 of the East Punjab Children Act are fully applicable to him. We, therefore, partly allow his appeal. We uphold his conviction, but set aside his sentence. We report his case to the State Government under section 34(1) of the East Punjab Children Act and direct that he be kept in safe custody, separate from adult prisoners and hardened criminals, having proper facilities for education, vocational training and ethical instruction on such conditions and for such period as the State Government thinks fit. Of course, as postulated under the Act, the said period shall not exceed the maximum period of imprisonment to which Joginder Pal appellant could be sentenced for the offence of murder. It is further directed that the State Government shall take the decision under section 34(2) of the Act within two months from today, with regard to the place and conditions of the detention of Joginder Pal.”

The State Government thereafter passed the order, dated January 7, 1982 (P.3), which reads:—

“In exercise of the powers conferred under sub-section (2) of section 34 of the East Punjab Children Act, 1949 (Punjab Act No. 39 of 1949), the Governor of Punjab is pleased to order that the youthful offender, Joginder Pal *alias* Papu, son of Shri Charan Dass, resident of Chowk Chirra,

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district Amritsar, at present confined in Central Jail, Amritsar, be henceforth detained in Certified School, Hoshiarpur, and he be kept separate from adult prisoners, hardened criminals, having proper facilities for education, vocational training and ethical instructions till he attains the age of eighteen years and thereafter in the Borstal Institute and Juvenile Jail, Faridkot till he attains the age of twenty-one years. With all aforesaid facilities, conditions after he has attained the age of 21 years he will be transferred to an ordinary jail for undergoing the remaining period of his detention order which will be issued by the Home Department. The period of detention will not exceed the maximum period of imprisonment to which Shri Joginder Pal could be sentenced for the offence of murder."

(2) The petitioner committed the offence of murder on December 14, 1979. In Criminal Appeal No. 400-DB of 1981, decided on November 9, 1981, it was held that the petitioner was 14 years of age on the date of occurrence. The petitioner would, therefore, be 19 years in December, 1984. The petitioner has assailed the order of the State Government, dated January 7, 1982, (P.3) on the ground that his detention after he attained the age of 18 years is illegal.

(3) The learned counsel for the petitioner has argued that the Government has ordered the detention of the petitioner in a Certified School, Hoshiarpur, till he attained the age of 18 years. The State Government could transfer the petitioner to a Borstal School under section 43(2) of the East Punjab Children Act, (hereafter the Act) but even by doing so he could not be detained therein beyond the age of 18 years under proviso thereto. The petitioner has been ordered to be detained in the Borstal School after attaining the age of 18 years as such the impugned order, dated January 7, 1982, (P. 3) is liable to be quashed being infraction of proviso to section 43(2) of the Act. Reliance has been placed on *and Yayendra and another v. State of Uttar Pradesh*, Cr. Revision 31 of 81, decided on 22nd January, 1981 (1), and *Munna and others, etc., v. State of U.P. and others, etc.,* (2).

(1) A.I.R. 1982, S.C. 685.

(2) A.I.R. 1982, S.C. 806.

(4) The term "child" has been defined under section 3(c) of the Act which reads:

" 'child' means a person under the age of 16 years and when used with reference to a child sent to a certified school applies to that child during the whole period of his detention, notwithstanding that the child may have attained the age of 16 years."

(5) The petitioner being 14 years of age when he committed the offence of murder on December 14, 1979, shall be treated as a child.

(6) Section 35 of the Act relates to the methods of dealing with children charged with offences. The relevant part of this section reads:

"Where a child charged with any offence is tried by any Court, and the Court is satisfied of his guilt, the Court shall take into consideration the manner in which, under the provisions of this or any other Act enabling the Court to deal with the case, the case should be dealt with, namely, whether—

(a) by discharging the offender after due admonition; or

(b) * * * * *

(c) * * * * *

(d) * * * * *

(e) by sending the offender to a certified school, or

(f) * * * * *

(g) * * * * *

(h) where the offender is a child of fourteen years or upwards to whom the proviso to section 27 applies, by sentencing him to imprisonment; or

(i) by dealing with the case in any other manner in which it may legally be dealt with:

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Provided that nothing in this section shall be construed as authorising the Court to deal with any case in any manner in which it could not deal with the case apart from this section.

(7) Section 34 deals with the detention in the case of certain crimes committed by children. It reads :

“(1) When a child is found to have committed an offence of so serious a nature that the Court is of opinion that no punishment which, under the provision of this Act, it is authorised to inflict is sufficient, the Court shall order the offender to be kept in safe custody in such place or manner as it thinks fit and report the case for the orders of the State Government.

(2) Notwithstanding the provisions of section 27, the State Government may order any such child to be detained in such place and on such conditions as it thinks fit, and while so detained the child shall be deemed to be in legal custody:

Provided that no period of detention so ordered shall exceed the maximum period of imprisonment to which the child could have been sentenced for the offence committed.”

(8) The High Court in Criminal Appeal No. 400-DB of 1981, decided on November 9, 1981, exercising the power under section 34(1) of the Act sent the case of the petitioner to the State Government for orders. The State Government passed the impugned order, dated January 7, 1982, (P.3) in exercise of the power conferred under section 34(2) of the Act.

(9) Section 42 and the relevant part of section 43 reads:

“42. *Period of detention.*—The period for which a child or youthful offender is to be detained in a certified school shall be specified in the order in pursuance of which he is sent there and shall be such period not being less than two years in the case of a youthful offender who at the date of the order is over the age of fifteen years and three years in the case of other youthful offenders as the Court

may deem proper for his teaching and training but not in any case extending beyond the time when he will, in the opinion of the Court, attain the age of eighteen years.

43. Discharge and transfer :—

- (1) The State Government may at any time order a child or youthful offender to be discharged from a certified school, either absolutely or on such conditions as the State Government approves.
- (2) The State Government may order a youthful offender over the age of sixteen years detained in a certified school to be transferred in the interest of discipline or for other special reasons to a Borstal School, established under the Punjab Borstal Act, 1926:

Provided that the whole period of the detention of the child or youthful offender shall not be increased by the transfer.

* * * * *

(10) Mr. Brar, Assistant Advocate-General, Punjab, has argued that the limit of 18 years for detention of a child prescribed under section 43(2) read with section 42 cannot be extended to a child transferred to the Borstal School in pursuance of an order passed by the State Government under section 34(2). The proviso to section 43(2) shall apply only where the child has been sent to the Certified School by the Court under section 35(e). The petitioner was not sent to the Certified School by the Court under section 35(e) of the Act. The petitioner was in fact ordered to be detained in the Certified School till he attained the age of 18 years by the State Government under section 34(2) of the Act. The power of the State Government under section 34(2) of the Act to order the detention of a child beyond the age of 18 years in a Borstal School does not stand curtailed by ordering his detention in a Certified School till he attained the age of 18 years. The contention of the learned Assistant Advocate-General must prevail.

(11) The Court trying a child can direct that he be detained in a Certified School under section 35(e) of the Act. The child can be detained in a Certified School by the Court till he attains the age of 18 years. After the child so detained in a Certified School has attained the age of 16 years he can be transferred to the Borstal School by the State Government under section 43(2). The proviso to

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section 43(2) will apply only to a case in which the child has been sent to a Certified School by the Court under section 35(e) and the State Government in exercise of powers under section 43(2) transfers him to a Borstal School after he attains the age of 16 years. The proviso to section 43(2) shall have no application where a child is ordered to be detained in a Certified School but by the State Government under section 34(2) of the Act.

(12) The learned counsel for the petitioner has argued that the High Court in Criminal Appeal No. 400-DB of 1981, decided on November 9, 1981, certified that the petitioner is not so unruly or of so depraved a character that he is not a fit person to be sent to a Certified School. The petitioner having been sent to a Certified School, though by the State Government under section 34(2), his detention could not be extended beyond the age of 18 years by the impugned order P.3. The contention is without merit. The observations of the High Court in Criminal Appeal No. 400-DB of 1981 regarding the petitioner being not so unruly or so depraved a character are hardly relevant in the context of his detention ordered by the State Government under section 34(2) beyond the age of 18 years even by sending him to a Certified School till he attained that age.

(13) The ratio of *Jayendra's case* (supra) and *Munna's case* (supra) is neither relevant nor applicable to the facts of the instant case. In Criminal Revision No. 31 of 1981 decided on January 22, 1981, the child convicted had been sent to the Certified School by the Court and not by the State Government under section 34(2) of the Act. The ratio of this authority can also be not pressed to the advantage of the petitioner.

(14) In view of discussion above, the petition fails and is dismissed with no order as to costs.

N. K. S.

Before D. S. Tewatia & Surinder Singh, JJ.

**ORIENTAL FIRE & GENERAL INSURANCE CO. LTD.,
CHANDIGARH,—Appellant.**

versus

SMT. BEASA DEVI AND OTHERS,—Respondents.

First Appeal from Order No. 452 of 1984

September 27, 1984

Motor Vehicles Act (IV of 1939)—Sections 92-A, 92-B, 92-E; 93(ba), 94, 95, 96 and 110-B—Motor accident resulting in the death