CRIMINAL WRIT

Before Ranjit Singh Sarkaria and S. C. Mital, JJ.

BORSTAL INMATE NARJIT SINGH,—*Petitioner*

versus

THE STATE OF PUNJAB, ETC.,—*Respondents.*

Criminal Writ No. 34 *of* 1972

April 6, 1973.

East Punjab Children Act (*XXXIX of* 1949)—*Sections* 27, 34 *and* 63—*Word "appears" in section* 63(1)—*Meaning of*—*Ipse dixit of an accused regarding his age*—*Whether sufficient to bring into operation section* 63(1)—*No finding regarding the age of youthful offender recorded under this section*—*Such youthful offender*—*Whether debarred to claim benefits under the Act at post-conviction stage*—*Benefits under the Act*—*Nature and scope of*—*Stated*—*Interpretation of the provisions of the Act*—*Whether to be in consonance with rule of beneficial construction*—*Child convicted for murder*—*Appropriate relief for*—*Whether reference under section* 34(1) *to the State Government.*

Held, that the word "appears" in section 63 of the East Punjab Children Act, 1949 is a strong word. It does not mean a remote possibility or every vague doubt arising in a sceptical mind. It presupposes something apparent and tell-tale in the outward physical appearance, build, size, look and behaviour of the person brought before the Court, on the basis of which, a *prima facie* belief, arises with regard to his being a child. Where a child is not much below 16 years and his being so is not manifest from his appearance, his *ipse dixit* regarding his age is not sufficient to satisfy the condition precedent bringing into operation the provisions of section 63(1) of the Act, because it is not uncommon for a person convicted by a criminal Court to grossly understate his age with a motive to get the concession and benefits which the law extends to youthful offenders, in the matter of sentence, custody and detention.

(Paras 9, 10 and 12).

Held, that the principle underlying sub-section (2) of section 63 of the Act is that if the Court after considering the evidence adduced before it, records a finding with regard to the age of the person brought before it, then such a finding shall be conclusive for the purposes of the Act. But where no such finding is recorded, there is nothing in the sub-section which is to be construed as debarring a youthful offender from claiming subsequently, even at the post-conviction stage, without assailing the validity of his trial or conviction, the benefit of the Act in the matter of his custody and detention period. (Para 13).

Held, that the Act makes special provisions with regard to the trial, custody, detention, treatment and reform-action of youthful offenders. The provisions of section 27 leave no doubt that in its application to such offenders, regarding matters covered by it, the Act is exclusive and overrides all other laws. For prescribing the dose of punishment or the nature and duration of treatment for delinquent children, the Act adopts three main criteria, nameuy, the age of the child, the character of the child and the nature of the offence committed by him. If the offence committed by the child is so serious that no punishment provided under the Act is, in the opinion of the Court, sufficient, then the case is to be reported under section 34 of the Act to the State Government for keeping him in safe custody leaving the period of such custody to be regulated by the Government within the limits laid down in that section. Section 73 of the Act shows that a Court empowered under the Act does not become *functus officio* after making an order in respect of a child, in the exercise of its original, appellate or revisional jurisdiction. The process of reformation of the delinquent continues through the agency of the Court.

Held, that the Act has been enacted to implement a social reform. It is a landmark, in the development of the science of penology. Its provisions, therefore, have to be interpreted in consonance with the rules of beneficial construction, in a liberal and generous spirit, and in a manner which promotes, rather than defeats the wholesome object of the Act. This means that if a provision can be read in two modes, the Court should lean towards that construction which preserves than towards that which destroys the purpose of the statute. (Paras 19 and 20).

Held, that where a child is tried and convicted for the offence of murder, the only appropriate relief that can be granted is to report the case to the State Government under section 34(1) of the Act for keeping the child in safe custody in a Borstal Jail, or certified school or like institution, 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. The Government can further be directed to take a decision under sub-section (2) of section 34 of the Act with respect to the place and conditions of his detention. (Para 26).

Petition under Articles 226/227 of the Constitution of India read with section 491 of the Code of Criminal Procedure, 1898, praying that a writ in the nature of habeas corpus or any other appropriate writ, order or direction be issued to the respondents that the petitioner be set at liberty from the illegal custody of the Superintendent, Borstal Institution.

Balwant Singh, Advocate, *for the petitioner.*

G. S. Tulsi, Advocate, for Advocate-General (Punjab), *for the respondents.*

JUDGMENT

SARKARIA, J.—This is a petition under sections 561-A and 491 of the Code of Criminal Procedure read with Articles 226/227 of the Constitution of India. It arises out of the following circumstances:

(2) Narjit Singh petitioner, his brother, Nachhattar Singh, and his relation, Niranjan Singh, all residents of village Barkandi, were tried by the Sessions Judge, Ferozepore, for the murders of their co-villagers, Bachittar Singh, Harminder Singh and Mukand Singh, and also on other charges including one under section 324 read with section 34, Penal Code, for causing hurt to one Kapur Singh. They were all convicted under section 302/34, Penal Code; Nachhattar Singh and Niranjan Singh being sentenced to death, and Narjit Singh to imprisonment for life. Narjit Singh was further convicted under section 324 read with section 34, Penal Code, and sentenced to one year's rigorous imprisonment. He was convicted under sections 25 and 27 of the Arms Act also, and sentenced to one year's rigorous imprisonment under each count.

(3) The convicts filed Criminal Appeal 800 of 1969 in this Court. Reference 59 of 1969 was also made under section 374, Criminal Procedure Code, by the Sessions Judge for confirmation of the death sentences. A Criminal Revision (882 of 1969) was preferred by the complainant party for enhancement of Narjit Singh's sentence to that of death. The appeal and the revision were disposed of by a common judgment, dated 4th December, 1969. We maintained the conviction of Narjit Singh and his companions with regard to all the three murders. The death sentence of Nachhattar Singh and Niranjan Singh was, however, commuted to that of imprisonment for life. Conviction of the petitioner and his companions on the other counts, was also upheld.

(4) In this petition which was filed on 12th July, 1972, Narjit Singh convict alleges that on the date of the commission of the offence, i.e., 13th January, 1969, he being less than 16 years of age, was a 'child' as defined in section 3(c) of the East Punjab Children Act (No. 39 of 1949) (hereinafter referred to as 'the Act'); and in view of the overriding and mandatory provision of section 27 of the Act, he could not be sentenced to imprisonment and committed to jail custody; that consequently, the trial Court's order, dated 30th June, 1969, sentencing him to imprisonment, and the Jail Commitment Warrant, being violative of the mandate of the Act, were without jurisdiction, void and inoperative. It is further alleged that the

authorities in order to rectify the "apparent illegality" of the commitment of the petitioner to Jail custody, transferred him on 21st December, 1969 to the Certified School at Hoshiarpur, with the result that in terms of section 42 of the Act, he could not be detained in school for more than 3 years or after completion of 18 years of age, whichever was earlier. Thus, he became entitled to be discharged from the School on 30th June, 1972, when he attained the age of 18 years, and his further detention beyond 30th June, 1972, being contrary to the provisions of the Act, is illegal. The petitioner, therefore, prays that a writ in the nature of habeas corpus be issued directing the Superintendent, Borstal Institution, to set the petitioner at liberty from the illegal custody. In the alternative, he prays for any other order or direction to the respondents as may be found appropriate.

(5) In the affidavit filed by Respondent 2 (Superintendent, Borstal Institution and Juvenile Jail) it has been specifically admitted that in the Jail Commitment Warrant the age of Narjit Singh is shown as 14/15 years. The petitioner's allegations (in paragraphs 3 and 4 of the petition) that at the time of the commission of the crime, he was less than 16 years of age, and, as such, was a "child" as defined in the Act, are not denied. In reply thereto, it is simply stated: "No comments". In answer to allegations in paragraph 5 of the petition, it is averred:

> "The petitioner was transferred from the Certified School, Hoshiarpur, to the Borstal Institution and Juvenile Jail, Faridkot, under section 43(2) of the Punjab Children Act, 1949,—*vide* Punjab Government Order No. 10695-ISW-71, dated 23rd September, 1971. An appeal of the petitioner against this transfer was dismissed by the Hon'ble High Court on 13th October, 1971,—*vide* Advocate-General, Punjab, No. A. 4-71/16304, dated 15th October, 1971. However, it appears that after finding the petitioner guilty under section 302, Indian Penal Code, the Sessions Court, Ferozepur, omitted to refer the case to the Punjab Government as required under section 34 of the Act and the same is being done now separately for fixation of the period of detention by the competent authority."

(6) From the pleadings quoted above, it emerges as an undisputed fact that at the time of the commission of the murders, Narjit Singh was less than 16 years of age. We, therefore, take it that at the time of committing these murders, Narjit Singh was a 'child' within the meaning of the Act.

(7) The question that arises, is: Does the fact of Narjit Singh being a 'child' render all the proceedings against him before the Committing Magistrate, the Sessions Judge and the High Court, including his conviction and sentence, illegal and void *ab initio*, entitling him to a writ of habeas corpus ?

(8) Mr. Malik learned counsel for the petitioner, contends that as soon as Narjit Singh stated his age to be 14 or 15 years before the Committing Magistrate/trial Judge, it was obligatory for that Court to make the preliminary enquiry envisaged in section 63(1) of the Act; and to record a finding with regard to the age of Narjit Singh; and its failure to do so, had vitiated all the proceedings, including the trial and conviction of the petitioner.

Section 63 is in these terms:

> "63. (1) Whenever a person, whether charged with an offence or not, is brought before any criminal court otherwise than for the purpose of giving evidence, and it *appears* to the court that he is a child, the court shall make due inquiry as to his age and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age as nearly as may be.
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> (2) An order or judgment of the court shall not be invalidated by any subsequent proof that the age of such person has not been correctly stated to the court, and the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person and, where it appears to the court that the person so brought before it is of the age of sixteen years or upwards, the person shall for the purposes of this Act be deemed not to be a child."

(9) A plain reading of the section shows that its sub-section (1) comes into play only if it "appears" to the Court that the accused or the person brought before it, is a 'child'. "Appears" is a strong word. It does not mean a remote possibility or every vague doubt arising in a sceptical mind. In its dictionary sense it means "to be clear in mind, to be obvious or evident, to be manifest" (See Webster's International Dictionary). It presupposes something apparent and telltale in the outward physical appearance, built, size, look and behaviour

of the person brought before the Court, on the basis of which, a *prima facie* belief, arises with regard to his being a child.

(10) In the instant case, it could not be manifest from the appearance of Narjit Singh, that he was a child. It was not a case where the accused was much below 16, when he appeared before the Magistrate. It was a border-line case. The *ipse dixit* of Narjit Singh that he was 14-15 years of age, was not sufficient to satisfy the condition precedent for bringing into operation the provisions of section 63(1), because it is not uncommon for a person in the age-group of 16—20, charged with a capital crime, to grossly understate his age with a motive to get the concessions and benefits which the law extends to youthful offenders in the matter of sentence, custody and detention.

(11) It is noteworthy that the defence did not, at any stage before the Magistrate or the trial Court, or even before this Court at the appellate stage, set up the plea that Narjit Singh was a 'child', and, as such, entitled to the benefit of the Act. As pointed out by the Madras High Court (while interpreting the words "due enquiry" in the analogous section 37 of the Madras Children Act, 1920) in *Ramudu* v. *Emperor* (1), the onus of introducing evidence that he is a 'child', rests on the accused person claiming the benefit of the Act. No such evidence was introduced before the Magistrate or the trial Judge, though Narjit Singh was properly defended by a counsel.

(12) In the circumstances, noticed above, section 63(1) of the Act was not attracted, and the Magistrate/trial Court was not bound to hold the preliminary enquiry as to the age of the petitioner. For the foregoing reasons, we would reject the first contention of Mr. Malik and answer the question posed in the negative.

(13) As regards Mr. Tulsi's contention that the case cannot be reopened and taken back to the pre-conviction stage because of the bar constituted by sub-section (2) of section 63 of the Act, the principle underlying this provision of law seems to be that if the Court, after considering the evidence adduced before it, records a finding with regard to the age of the person brought before it, then such a finding shall be conclusive for the purposes of the Act. But where, as in the present case, no such finding is recorded, there is nothing in the sub-section which is to be construed as debarring a youthful offender from claiming subsequently, even at the post-conviction stage, without assailing the validity of his trial or conviction, the benefit of the Act in the matter of his custody and

(1) A.I.R. 1932 Mad. 213.

detention period. Another point to be noted in this connection is that the respondents have themselves in the written statement taken the stand that the petitioner is being treated as a youthful offender and detained in the Borstal Jail in conformity with the provisions of sub-section (2) of section 34 of the Act and they seek formal order of the Court under sub-section (1) in the same section to 'regularise' the detention. Thus the respondents cannot be permitted to turn round and say that the petitioner is debarred from claiming benefiit under the Act.

(14) For finding as to which benefit is available to the petitioner, it is necessary to examine briefly the scheme, object and the relevant provisions of the Act. Its preamble reads:—

> "An Act to make provisions for the custody and protection of children and for the custody, trial, and punishment of youthful offenders and for the amendment of the Reformatory Schools Act, 1897, in its application to the State of Punjab."

The following definitions in section 3 are also material:—

"(a) * * * *.

(b) "Certified school" means an industrial school established under sub-section (1) or any industrial school or any other educational institution certified under sub-section (2) of section 46 of this Act;

(c) "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;

* * * * * * * *

(i) "Juvenile court" means a separate court established under sub-section (1) of section 60 of this Act and includes a court before which a child is brought under sub-section (2) of that section;

* * * * *. * *

(m) "Youthful offender" means any child, who has been found to have committed an offence punishable with transportation or imprisonment."

(15) Section 6 of the Act indicates the Courts which shall exercise the powers under this Act. It reads:—

"6. The powers conferred on courts by this Act shall be exercised only by:—

(a) the High Court;

(b) a Court of Session;

(c) a District Magistrate;

(d) a Sub-Divisional Magistrate;

(e) any Juvenile Court constituted under section 60;

(f) any Magistrate of the 1st Class;

(g) any court notified in this behalf by the State Government:

and may be exercised by such courts whether the case comes before them in the exercise of original jurisdiction or on appeal or revision."

Section 27 lays down:—

"*Notwithstanding anything to the contrary contained in any law,* no person, who was a child at the date of the commission of the offence *shall* be sentenced to death or transported or committed to prison for any offence or in default of payment of fine, damages or costs:

Provided that a child who is fourteen years of age or upwards may be committed to prison where the court certifies that he is of so unruly or so depraved a character that he is not a fit person to be sent to a certified school and that none of the other methods in which the case may legally be dealt with is suitable."

(16) Sub-section (1) of section 29 provides for the sending of a child to a Certified school and section 42 lays down that the Court shall specify the period for which the child is to be detained therein. The various methods of dealing with a child found guilty of commission of an offence are enumerated in section 35. They consist of discharging him after due admonition, committing him to the care of his parent or guardian, discharging him after placing him under the supervision of a person, releasing him on probation of good conduct, sending him to a Certified school, etc.

(17) Section 34 of the Act, in conformity with the provisions of which the petitioner has so far been treated by the respondents, runs thus:—

> "34. (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 provisions 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 shall report the case for the orders of the State Government.
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> (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:
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> 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."

(18) The other important section 73 is in these terms:—

> "73. Without prejudice to the powers of courts of appeal and revision, *any custody order*, supervision order or probation order *may be amended by the Court which made the order in respect of the person named as custodian supervisor* or probation officer, the *period of duration* and such matters as may be prescribed."

(19) From a survey of the provisions referred to above, it emerges that the Act makes special provisions with regard to the trial, custody, detention, treatment and reform-action of youthful offenders. The provisions of section 27 leave no doubt that in its application to such offenders, regarding matters covered by it, the Act is exclusive and overrides all other laws. For prescribing the dose of punishment or the nature and duration of treatment for delinquent children, the Act adopts three main criteria, namely: the age of the child, the character of the child and the nature of the offence committed by him. If the offence committed by the child is so serious that no punishment provided under the Act is, in the opinion of the Court, sufficient, then the case is to be reported under section 34 of the Act to the State Government for keeping him in safe custody leaving the period of such custody to be regulated by

the Government within the limits laid down in that section. Section 73 of the Act shows that a Court empowered under the Act does not become *functus officio* after making an order in respect of a child, in the exercise of its original, appellate or revisional jurisdiction. The process of reformation of the delinquent continues through the agency of the Court.

(20) It must be remembered that the Act has been enacted to implement a social reform. It is a landmark in the development of the science of penology. Its provisions, therefore, have to be interpreted in consonance with the rules of beneficial construction, in a liberal and generous spirit, and in a manner which promotes, rather than defeats the wholesome object of the Act. This means that if a provision can be read in two modes, the Court should lean towards that construction which preserves than towards that which destroys the purpose of the statute. This rule was adopted by the Supreme Court,—[*vide Rattan Lal* v. *Punjab State* (2)] in interpreting the provisions of the Probation of Offenders Act, 1958 (hereinafter called the 'Probation Act'), which belongs to the same class of statutes which, in recent times, have been enacted with the object of reforming juvenile or youthful offenders and reclaiming them to society as good citizens. In that case (*ibid*), Rattan Lal, aged 16 years, was convicted in respect of offences under sections 451/354, Penal Code, and sentenced to six months' rigorous imprisonment and fine. He preferred an appeal against the order of his conviction to the Additional Sessions Judge, Gurgaon. During the pendency of that appeal, the Probation Act came into force. But neither the appellant relied upon the provisions of the Probation Act, nor did the Additional Sessions Judge exercise his powers thereunder. On dismissal of his appeal, Rattan Lal filed revision in the High Court. No ground was taken in the revision that the Additional Sessions Judge should have acted under section 6 of the Probation Act. After the dismissal of his revision, Rattan Lal filed a petition in the High Court requesting it to exercise its jurisdiction under section 11 of the Probation Act and to pass order under sections 3, 4 or 6 thereof. The High Court dismissed that petition. Rattan Lal went in appeal by special leave before the Supreme Court.

(21) The counsel for the State opposed the appeal before the Supreme Court contending, *inter alia*, that the appellant not having raised this plea till after the revision petition was dismissed by the

(2) A.I.R. 1965 S.C. 444.

High Court, was precluded by his default to raise the same at that late stage by means of a petition under section 11 of the Probation Act. It was maintained that under sub-section (1) of section 11, an order under that Act could be made by any Court empowered to try and sentence the offender to imprisonment and also by the High Court only when the case came before it on appeal or in revision.

Section 11(1) of that Act is in these terms:—

> "Notwithstanding anything contained in the Code or any other law, an order under this Act may be made by any Court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court *when the case comes before it on appeal or in revision.*"

(22) In spite of the narrower language used in section 11(1) of the Probation Act, the Supreme Court rejected the contention of the State counsel, and applying the rule of beneficial construction, held that the High Court was competent, on an application made to it under section 11 of the Probation Act, even after the dismissal of the petitioner's revision petition, to accord the benefit of the mandatory provisions of that Act to the petitioner. Delivering the majority judgment, Subba Rao J. (as he then was), observed:—

> "The first question is whether the High Court, acting under section 11 of the Act, can exercise the power conferred on a Court under section 6 of the Act. It is said that the jurisdiction of the High Court under section 11(3) of the Act is confined only to a case that has been brought to its file by appeal or revision and, therefore, it can only exercise such jurisdiction as the trial court had .....
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> This is not a case, where an act, which was not an offence under the Act, is made an offence under the Act; nor this is a case where under the Act a punishment higher than that obtaining for an offence before the Act is imposed. This is an instance where neither the ingredients of the offence nor the limits of the sentence are disturbed, but a provision is made to help the reformation of an accused through the agency of the court.....In considering the scope of such a provision we must adopt the rule of beneficial construction as enunciated by the modern trend of judicial opinion

without doing violence to the provisions of the relevant section ..... The provision that directly applies to the present case is section 11(1) of the Act, whereunder an order under the Act may be made by any Court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court when the case comes before it on appeal or in revision. The sub-section *ex facie* does not circumscribe the jurisdiction of an appellate court to make an order under the Act only in a case where the trial court could have made that order The phraseology used therein is wide enough to enable the appellate court or the High Court, when the case comes before it, to make such an order. It was purposely made comprehensive, as the Act was made to implement a social reform ..... the High Court for the first time could make such an order under section 11 of the Act .....

But in this case both the Additional Sessions Judge and the High Court ignored the mandatory provisions of the Act (Probation Act). It is true that the accused did not bring the provisions of the Act to the notice of the Court till after the revision was disposed of. But that does not absolve the court from discharging its duty under the Act."

(23) The above-quoted observations of the Supreme Court are fully applicable to the case in hand. It will bear repetition that the (children) Act is also (to use the words of the Supreme Court) a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of the criminal law is more to reform the individual offender than to punish him.

(24) Just as section 11(1) of the Probation Act empowers the High Court or any other Court to pass an order under the Act when the case comes before it on appeal or in revision, in the same way, section 6 of the Punjab Children's Act lays down that the powers conferred on the High Court by this Act may be exercised when the case comes before it on appeal or revision. That being so, respectfully following the Supreme Court ruling, the relief claimed by

Narjit Singh can be granted to him even though at the time of the disposal of the appeal no request on his behalf was made before this Court. The fact that the respondents have already been dealing with him under section 34 of the Act is significant. In other words, there does not seem to be any real objection by the respondents.

(25) As to the nature of the relief to be granted to the petitioner, it may be recalled that the petitioner along with others, was tried and convicted for the murders of three persons, namely, Bachittar Singh, Harminder Singh and Mukand Singh. The petitioner is said to have caused fatal blows with a *barchha* to two of the victims. It was manifest in the circumstances of the case that the offences committed by the petitioner were of so serious a nature that no punishment, which under the provisions of the Act the Court was authorised to inflict, could sufficiently meet the ends of justice.

(26) The only appropriate course, therefore, was to report the case to the State Government under section 34(1) of the Act which we do hereby—for keeping the petitioner in safe custody in a Borstal Jail or certified school or like institution, 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 (not exceeding the maximum period of imprisonment to which the petitioner could be sentenced for the offence of murder). It is further directed that the State Government shall take a decision under sub-section (2) of section 34 of the Act, within a reasonable time, with respect to the place and conditions of Narjit Singh's detention.

(27) In the result, the petition is accepted to the extent indicated above, without any order as to costs.

MITAL, J.—I agree.

N. K. S.