

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

(Heard through VC)

(1)

CRM-M-21388 of 2020 (O&M)
Date of Decision: August 31, 2020

Vicky

...Petitioner

Versus

State of U.T., Chandigarh

...Respondent

(2)

CRM-M-21392 of 2020 (O&M)

Nitesh

...Petitioner

Versus

State of U.T., Chandigarh

...Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Salil Dev Singh Bali, Advocate
for the petitioners.

Mr. A.M. Punchhi, P.P., U.T., Chandigarh.

JAISHREE THAKUR, J.

1. By this common order, this court shall dispose of above captioned two petitions i.e. **CRM-M-21388 of 2020** titled as **Vicky vs. State**

of U.T., Chandigarh and **CRM-M-21392 of 2020** titled as **Nitesh vs. State of U.T., Chandigarh** as the questions of law in both the cases are similar.

2. Both the petitions have been filed under Section 439 Cr.P.C. for grant of regular bail during the pendency of trial in FIR No.36 dated 18.02.2019, under Sections 147, 148, 149, 302, 34 of Indian Penal Code, registered at Police Station Mauli Jagran, Chandigarh.

3. For the sake of brevity, facts are being taken from CRM-M-21388 of 2020. The aforesaid FIR came to be registered on the statement of Amit s/o Viney Pandey to the effect that while he was standing on the roof of his house, 4-5 persons were fighting. He was able to see that said persons were holding some shining weapon in their hands. Thereafter, noise of “*bachao bachao*” started coming and he dialled 100 number. The PCR van came and he too reached at the spot, where he noticed that one person was lying in injured condition and was taken to the hospital by the PCR van. It was stated that the man had been injured with the intention of killing him and he could identify them, if they were brought forward. The matter was investigated and ultimately, the petitioners namely Vicky and Nitesh were nominated as accused. On due interrogation, Vicky gave a statement and from his hut, a blood stained *kulhari* and clothes were duly recovered. The petitioners were sent to the Juvenile Home and thereafter, the Juvenile Justice Board formed an opinion by its order dated 11.03.2019 that Vicky was to be tried as an adult in the Children's Court for the death of one Laxman. He thereafter preferred an application for regular bail under Section 439 Cr.P.C., which was dismissed by the Addl. Sessions Judge, Chandigarh vide its order dated 30.05.2020 and while dismissing the said

application, it was noted that his first bail application was dismissed by an order dated 12.06.2019.

4. Similarly, broken piece of sword allegedly used by petitioner-Nitesh was recovered from his possession and by an order dated 26.04.2019, an opinion was formed by the Juvenile Justice Board that he was to be tried as an adult in the Children's Court. The bail application under Section 439 Cr.P.C. preferred by petitioner-Nitesh was dismissed by the Addl. Sessions Judge, Chandigarh on 07.07.2020. Aggrieved against the said dismissal of the bail applications, the instant petitions have been filed.

5. Learned counsel for the petitioners would submit, that admittedly the petitioners herein are juvenile within the meaning of Section 2(35) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'the J.J. Act'), therefore, would be entitled to grant of bail under Section 12 of J.J. Act. It is argued that the law is settled that the gravity of the offence cannot be taken into account at the time of considering the bail application of the juvenile. It is also submitted that grant of bail to a child alleged to be in conflict with law is the rule rather than an exception. It is argued that bail can only be denied if any of the three contingencies specified in Section 12 of the J.J. Act are satisfied and in the instant case there is no such finding to the effect that the petitioner if released would be brought into association with any known criminal or be exposed to moral, physical or psychological danger.

6. Per contra, petitions for grant of regular bail are strenuously opposed by learned counsel appearing on behalf of respondent-U.T., Chandigarh. Mr. Ashu Punchhi learned Senior Standing Counsel for the

Chandigarh Administration contends that the petitioners herein are guilty of heinous crime of having committed the murder of one Laxman and the weapons used in the commission of crime were recovered from them. It is further argued that after the preliminary assessment was done by the Board regarding the mental and physical capacity of the petitioners to have committed the offence and the ability to understand the consequences of the offence, an order under Section 18(3) of the J.J. Act has been passed to the effect that the child in conflict with law was to be tried as an adult. It is urged that on basis of the assessment made, the matter was posted before the Children's Court having the jurisdiction to try the offence. It is contended that petitioner-Vicky filed an application under Section 12 of the J.J. Act before the Board on 12.03.2019 but withdrew his said application on 26.04.2019 and this fact has not been disclosed by the petitioner-Vicky in his petition. It is contended that once the bail application has been withdrawn, he could not have filed a petition for grant of bail under Section 439 Cr.P.C. and the only remedy available to them would have been to re-apply for bail before the J.J. Board under Section 12 of the J.J. Act and in case, the application had been rejected, then an appeal should have been preferred under Section 101(1) of the J.J. Act and a revision under Section 102 of the J.J. Act thereafter. In this regard reliance is placed upon a judgement rendered in the case of ***Radhika (Juvenile) and others v. State of UP and others 2019 (3) Crimes 311.***

7. Mr. Salil Bali, learned counsel for the petitioners counters the arguments addressed by learned State counsel by contending that there is no bar on an application being preferred under Section 439 Cr.P.C., since the

matter is being tried by the Children's Court and not by the J.J. Board. It is argued that once the J.J. Board formed an opinion that the matter is to be tried by the Children's Court, the provisions of the Code of Criminal Procedure, 1973 would be applicable and, therefore, bail application under Section 439 Cr.P.C. would be maintainable.

8. I have heard learned counsel for the parties and have gone through the pleadings of the case.

9. Before one can come to a conclusion whether the petitioners would be entitled to regular bail, a question has to be answered as to whether a child in conflict with law, who is being tried as an adult for the purpose of trial under Section 18(3) of the J.J. Act, could maintain an application for grant of regular bail under Section 12 of the J.J. Act or under Section 439 Cr.P.C. before the Children's Court and the High Court.

10. Some of the important provisions of the J.J. Act, with which the court would be concerned, are reproduced as under:-

“Section 1 - Short title, extent, commencement and application:-

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including — (i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law; (ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection.

2. Definitions.—*In this Act, unless the context otherwise requires,—*

(12) “child” means a person who has not completed eighteen years of age;

(13) “child in conflict with law” means a child who is alleged or

found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence;

(20) "Children's Court" means a court established under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court under the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act;

(35) "juvenile" means a child below the age of eighteen years;

8. Powers, functions and responsibilities of the Board.—(1) *Notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, the Board constituted for any district shall have the power to deal exclusively with all the proceedings under this Act, relating to children in conflict with law, in the area of jurisdiction of such Board.*

(2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Children's Court, when the proceedings come before them under Section 19 or in appeal, revision or otherwise.

(3) xxx xxxx xxx

12. Bail to a person who is apparently a child alleged to be in conflict with law.—(1) *When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) xxx xxx xxx

15. Preliminary assessment into heinous offences by Board.

(1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such

offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-Section (3) of Section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation.—For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974):

18. Orders regarding child found to be in conflict with law.—

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) Where the Board after preliminary assessment under Section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.

19. Powers of Children's Court.—*(1) After the receipt of preliminary assessment from the Board under Section 15, the Children's Court may decide that—*

(i) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) and pass appropriate orders after trial subject to the provisions of this Section and Section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;

(ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of Section 18.

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) xxx xxx xxx

(5) xxx xxx xxx

102. Revision.—*The High Court may, at any time, either on its own motion or on an application received in this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:*

Provided that the High Court shall not pass an order under this Section prejudicial to any person without giving him a reasonable opportunity of being heard.”

11. A careful reading of the aforesaid provisions would make it clear that Section 1(4) of the J.J. Act clearly specifies that, despite anything contained in any other law for the time being in force, provisions of J.J. Act shall apply to all matters concerning children in need of care and protection and children in conflict with law. It is a well settled principle of law that when there is special law and general law, the provisions of the special law prevail over the general law. The J.J. Act has been enacted as a special legislation as *“An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto.”* (as taken from the preamble of the Act). The Act is a complete code in itself, which lays down a procedure as to how a child in conflict with law is to be dealt with. The emphasis being on effort to rehabilitate a Child in Conflict with Law. Petty offences are to be disposed of by the Board through summary procedure prescribed by Cr.P.C.; serious offences are to be disposed of by the Board through procedure followed for trial in a summons case as under Cr.P.C.; and heinous offences committed by a child below the age of 16 years as a

trial in a summons case whereas for a heinous offence committed by a child above the age of 16 years as on date of commission of offence shall be dealt with as prescribed in Section 15 of the J.J. Act.

12. Section 15 of the J.J. Act provides for a preliminary assessment to be carried out by the board of a child who is above the age of 16 years with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence. An order will then be made by the Board to transfer the trial of the case to the Children's Court having jurisdiction to try such offences by virtue of Section 18 (3) of the J.J. Act. Here, the important word used in Section 18(3) of the J.J. Act is '*trial*' which clearly specifies that the transfer of the case made by the Board to the Children's Court is only for the purpose of '*trial*' and not for any other purpose.

13. *Per se*, the provisions of Cr.P.C. would not be applicable in dealing with a Child in Conflict with Law, who has been apprehended or detained for having committed an offence by virtue of Section 1(4) of the J.J. Act. The only reference to the applicability of the provisions of Cr.P.C. is for the purposes of a '*trial*' as envisaged under Section 19 of the J.J. Act when Section 19(1)(i) specifies "*there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 and pass appropriate orders after trial subject to the provisions of this section*".

14. The only section that pertains to the grant of bail to a juvenile who has been apprehended or detained is [the word arrested as used in the Juvenile Justice (Care and Protection of Children) Act 2000 stands deleted]

under Section 12 of the J.J. Act. This section itself clearly spells out that notwithstanding any contained in the Code of Criminal Procedure or in any other law for the time being in force, bail shall be allowed to a child who is alleged to have committed a bailable or non bailable offence. However, there is a rider to this directive, which has further been specified in the proviso itself. Bail is not to be allowed in case there appear reasonable grounds for believing that the release of the juvenile 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. The Juvenile Justice Board is to record reasons for declining bail. Interestingly enough, the J.J. Act is silent and does not differentiate between bail being allowed to a juvenile who is alleged to be involved in a petty offence, serious offence or a heinous one, or between a juvenile who is being tried as an adult before the Children's Court.

15. The argument raised that the Board would become *functus officio*, once the matter has been transferred to the Children's court, is unsustainable since there is no other provision under the J.J. Act for deciding the question of bail. Section 8(2) of the J.J. Act permits the High Court and Children's Court to exercise powers conferred upon the Board when the proceedings come before them under Section 19 or in appeal, revision or otherwise. The functions and the responsibilities of the Board are detailed in Section 8(3) (a) to (n) and these are silent on the question of entertaining bail. The term '*otherwise*' cannot be read as a power to entertaining an application under Section 439 Cr.P.C., which would then render Section 12 of the J.J. Act meaningless. Looked from another angle,

in case an application for bail is filed before the Children's court under Section 439 Cr.P.C, would the application be decided within those parameters which are discretionary in nature, or following the provisions of Section 12 of the J.J. Act, which clearly specifies that bail shall be allowed to a juvenile, notwithstanding the provisions of Cr.P.C. or any other law for the time being in force. Bail may be rejected under Section 439 Cr.P.C. keeping in mind the gravity and the heinousness of the offence committed, whereas the gravity of the offence shall not be a consideration when the J.J. Board is deciding the question of bail. However it can reject bail under Section 12 of the J.J. Act only under such three circumstances as mentioned in the proviso and not beyond that. The provisions for grant of bail under the J.J. Act and under Section 439 Cr.P.C. are inconsistent with each other. Keeping in view the Special Act where the main objective is to rehabilitate a juvenile, Section 12 regarding grant of bail was incorporated in the J.J. Act, rather than following the procedure under Section 439 Cr.P.C, where there is every possibility of continued jail term on denial of bail. Once a procedure is prescribed within the J.J. Act for grant of Bail, there can be no cogent reason for deviating from the same.

16. The Allahabad High Court in its judgement rendered in ***Radhika (Juvenile) and others v. State of UP and others 2019 (3) Crimes 311*** also dealt with the issue of a bail application filed before the Children's Court under section 439Cr.P.C. instead of approaching the JJ Board under Section 12 of the J.J. Act and it held as under:

“This Court has carefully gone through the aforesaid provisions of law. Section 8 of the Act speaks about function and responsibility of the Board which has been categorically spelled

out in Sub Section 8(a) to 8(n) of the Act, therefore, considering the functions and responsibilities of the aforesaid provisions of law, the High Courts and Children Courts have power akin to the Board in appeal or revision. In these functions and responsibilities, there is not even a whisper that the High Court can decide the bail application of the appellants in exercise of powers under Section 101(5) of Act, and thus, I am afraid to accept the contentions raised by learned counsel in this regard. Moreover, when there is specific remedy provided under the Act itself regarding bail of delinquent juvenile, leaving no scope of any other interpretation, one cannot be permitted to mould it or bypass it for the sake of his convenience and file an appeal under Section 101(5) of the Act before the High Court.”

17. In ***Tejram Nagrachi Juvenile v. State Of Chhattisgarh and others 2019 CriLJ 4017***, the Division Bench on the issue whether an application for bail could be maintained under Section 439 Cr.P.C. in view of the specific provisions of Section 12 of the J.J. Act held:

“8. In the matters of Mohan and Subhash Kumar @ Sonu (Supra), the coordinate Benches have based their decision over the use of the word "otherwise" in subSection (2) of Section 6 of the Juvenile Justice (Care and Protection of Children) Act, 2000, which is pari materia to Section 8 (2) of the Act of 2015. However, the said provision does not deal with the powers of the Board to grant bail which is specifically contained under Section 12 of the Act, of 2015. While there is no denial of the fact that when the Court of Sessions exercises appellate power under Section 101 (2) and the High Court exercises revisional power under Section 102 of the Act of 2015, it shall exercise power of the Board provided under Section 8(2), but this power of the Board would also be available to the Court of Sessions or to the High Court when it proceeds to examine the plea of juvenile for grant of bail whenever such occasion arises on account of bail application of juvenile being rejected under Section 12 of the Act of 2015. Therefore, by use of the term "otherwise" in Section 8(2), jurisdiction under Section 439 of the Code would not be attracted which is otherwise excluded by use of the term "notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force", as occurring in Section 12 (1).

9. It is also to notice that under the statutory scheme of the Act of 2015, a comprehensive provision has been made as to how a child in conflict with law has to be dealt with when he is apprehended and not released on bail. The said provisions are

contained under subsections (2), (3) & (4) of Section 12 of the Act of 2015. Under the said provision, on denial of bail, such person (Juvenile) has to be kept in observation home in the manner prescribed until he is brought before the Board. It is also provided that when a child in conflict with law is unable to fulfill the conditions of bail within 7 days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.

10. The provisions pari materia to this are not available under Section 439 of the Code, therefore, on denial of bail under Section 439 of the Code or when the bail is allowed but the juvenile is not able to satisfy the conditions of bail, it is not mandated under the Code that such child shall be produced before the Board for modification of the conditions of bail. In the absence of this provision either in case of denial of bail or even when the bail is allowed under Section 439 of the Code, but the conditions of bail are not satisfied, the juvenile would be deprived of his statutory right under Section 12 (2), (3) & (4) of the Act of 2015. It is precisely for this reason Section 12 of the Act of 2015 provides for overriding effect due to use of non-obstante clause, therefore, the post arrest bail of juvenile in conflict with law is required to be dealt with under the special provision contained in Section 12 of the Act of 2015 and to the said extent it will exclude operation of Section 437 and/or Section 439 of the Code.”

18. Consequently, this court has no hesitation in holding that an application for grant of bail to a Child apprehended or detained by the police will be entertained by the J.J. Board under Section 12 of the J.J. Act and an application under Section 439 Cr.P.C. before the Children's Court will not be maintainable.

19. As an upshot of the discussion above, these petitions are being disposed of with a direction for the petitioners to approach the J.J. Board under Section 12 of the J.J. Act, if not already done, as in the case of Vicky. In case any application is filed before the J.J. Board, it is to be decided within a period of 7 days thereafter. As far as petitioner-Vicky is concerned, he has already withdrawn his application before the J.J. Board,

