A

SUBHASH CHAND

v.

STATE OF HARYANA AND ORS.

JANUARY 11, 1988.

B

[RANGANATH MISRA, B.C. RAY AND K.JAGANNATHA SHETTY, JJ.]

Punjab Borstal Act, 1926: ss. 5 and 2(4)(i)(a)—Adolescent convicted for offence of murder and sentenced to imprisonment for life—Whether entitled to the benefit of the Act.

C

Section 5 of the Punjab Borstal Act, 1926 empowers courts to pass a sentence of detention in a Borstal institution in the case of male persons less than twenty one years of age convicted of an offence, in lieu of transportation or rigorous imprisonment. Section 2(4)(i)(a) of the Act D **which defines 'offence' takes in offences other than an offence punishable with death.**

In his writ petition under Article 32 of the Constitution, the petitioner who has been convicted for the offence of murder and sentenced to imprisonment for life claimed benefit of the Punjab Borstal E **Act relying on *Hava Singh* v. *State of Haryana,* AIR 1987 SC 2001. The State contested his claim.**

Dismissing the writ petition.

HELD: **1.1 The Punjab Borstal Act does not have application to** F **an offence punishable under s. 302 I.P.C. [561F-G]**

1.2 What is excepted in the definition of 'offence' in s. 2(4)(i)(a) of the Act is an offence which is punishable with death. One of the punishments under s. 302 I.P.C. for the offence of murder is death, and, therefore, the offence of murder would be covered with s. 2(4)(i)(a) G **of the Act and to such a conviction the Punjab Borstal Act would have no application. [560 F-G]**

1.3 The petitioner is, therefore, not entitled to the benefit of the Punjab Borstal Act as he has been sentenced to imprisonment for life for the offence of murder punishable under s. 302 I.P.C. for which the H **sentence of death is prescribed as an alternate. [561G]**

1.4 In *Hava Singh's*, case the definition of offence was not placed for consideration before the court and, therefore, the conclusion which has been reached is not correct. [561F]

***Emperor* v. *Mt. Janki & Anr.*, AIR 1932 Nag. 130; *King Emperor* v. *Nga San Htwa & Ors.*, AIR 1927 Rangoon 205; *Chetti* v. *State of Madhya Pradesh*, AIR 1959 MP 291; *Emperor* v. *Bahawati*, AIR 1928 Lahore 920; *State* v. *Sheo Shankar*, AIR 1956 All. 326; *Public Prosecutor of Madras* v. *Paneswar Rao*, AIR 1946 Mad. 178; *Sarkar* v. *Jalam Singh*, AIR 1950 Raj. 28 and *Narauji Premji* v. *Emperor*, AIR 1928 Bom. 244, referred to.**

***Hava Singh* v. *State of Haryana*, AIR 1987 SC 2001 overruled.**

CRIMINAL ORIGINAL JURISDICTION: Writ Petition (CRL) No. 745 of 1987.

(Under Article 32 of the Constitution of India).

J.M. Khanna for the Petitioner

Ravindra Bana, G. Venkatesh Rao and C.V. Subba Rao for the Respondents.

The following Order of the Court was delivered:

ORDER

The petitioner has been convicted for the offence of murder and sentenced to imprisonment for life. He claims in this application under Article 32 of the Constitution the benefit of the Punjab Borstal Act and has placed reliance on a decision of this Court in the case of *Hava Singh* v. *State of Haryana*, AIR 1987 SC 2001. A counter affidavit has been filed disputing the tenability of the claim.

In *Hava Singh's* case (supra) a two-Judge Bench (including one of us) was considering the claim of a convict for an offence of murder to release taking into account the period the prisoner had stayed in the Borstal institution. In that case, it was observed:

> "It is evident from the averments made in the writ petition as well as in the said counter-affidavit that the petitioner was admittedly adolescent at the time of his con-

viction was sent to Borstal Institute at Hissar. Subsequently, he has been transferred to the District Jail at Rohtak and is undergoing the sentence of imprisonment for life. It appears from the objects and reasons of Punjab Borstal Act, 1926 that the object of the Act is to provide for segregation of adolescent prisoners from those of more mature age, and their subsequent training in separate institutions. These Borstal Institutions meant for detaining adolescent offenders and to impart to them such industrial training and other instructions and subject them to such disciplinary and moral influence as will conduce to their reformation. This is evident from the provisions of section 2(1) of Punjab Borstal Act, 1926. Sub-section (2) of section 2 defines *detained* as detained in and *detention* as detention in a Borstal Institution. Section 5 of the said Act which is very vital for the purpose of decision of this case is quoted hereinbelow:

> '5. Powers of courts to pass a sentence of detention in a Borstal Institution in the case of a convict under twenty-one years of age in lieu of transportation or rigorous imprisonment—(1) When any male person less than twenty-one years of age is convicted of an offence by a court of sessions, a Magistrate specially empowered under section 30 of the Code of Criminal Procedure, 1898, or a Judicial Magistrate of the first class, or is ordered to give security for good behaviour and fails to give such security, and when by reason of this criminal habits or tendencies or associations with persons of bad character it is expedient in the opinion of the Judge or Magistrate, that he should be detained, such Judge or Magistrate may, in lieu of passing a sentence of transportation or rigorous imprisonment, pass an order of detention for a term which shall not be less than two years and shall not exceed seven years when the order is passed by a court of sessions or a Magistrate specially empowered under section 30 of the Code of Criminal Procedure, 1898, and shall not be less than two years nor exceed three years, when the order is passed by a judicial magistrate of the first class not so empowered.
>
> (2) .....

(3) .....

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This court further stated:

> "The petitioner who was adolescent admittedly being less than twenty-one years of age at the time of his conviction though convicted under Section 302/34 I.P.C. and sentenced to imprisonment for life, was sent to the Borstal Institute in accordance with the provisions of Punjab Borstal Act, 1926. On his attaining the age of about twenty-one years he was transferred back to the Jail. There is no provision except section 20 under the said Act for transferring back an adolescent convict on his attaining the age of twenty-one years from the Borstal Institute to Jail for undergoing the unexpired term of imprisonment.

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The Court then referred to section 20 of the Act dealing with incorrigibles and observed:

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> "The section empowers the State Government to commute the residue of the term of detention of an inmate in Borstal Institute to such term of imprisonment of either description not exceeding the residue as the State Government may direct and also to order transfer of the inmate to any jail in Punjab in order to complete the said term of imprisonment when such an inmate is reported to be incorrigible or is exercising bad influence on the other inmates of the Institution or such an inmate has committed a major Borstal Institution offence as provided in the rules."

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The Court then stated:

> "This Court while considering an indentical case in the *State of Andhra Pradesh* v. *Vallabhapuram Ravi,* AIR 1985 SC 870 has observed that a person detained in a Borstal School under section 10-A has to be released after he has served the full term of 5 years of detention or on his completing 23 years of age. He cannot be retransferred thereafter to prison. Such a retransfer would defeat the very object and purpose of the Act of providing for detention of young offenders in Borstal School for the purpose of reformation and rehabilitation of such offenders'. It is to be

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A noted in this connection that sentence of detention is passed in lieu of sentence of imprisonment which may have been passed. Hence the detention order under section 5 of the said Act is not imprisonment and Borstal School where the adolescent offender is detained is not a prison. It has also been observed further that section 433-A, Cr. P.C. B would not operate where a person is detained by an order under section 10-A of the Act. Section 433-A of the Code was introduced not to set at naught provisions like 10-A of the Act which dealt with a special class of offenders like adolescent offenders but only to regulate capricious and arbitrary decisions under Section 432 of the Code and the C remission rules sometimes reducing the sentence of imprisonment for life imposed on persons who had been convicted of capital offences but had been sentenced to imprisonment for life to short periods like five to six years."

Under the Punjab Act, 'offence' has been defined in section 2(4) D to mean—

"an offence punishable with transportation or rigorous imprisonment under the Indian Penal Code other than—

E (a) an offence punishable with death;."

Hava Singh's case did not refer to the definition of 'offence' and relied upon the decision in the case of *Ravi* (supra) though the scheme of the Andhra Act was very different. The Andhra Act known as the Andhra Pradesh Borstal Schools Act, 1925, does not have the definition of F 'offence' and there is no exclusion as provided in the Punjab Act.

What is excepted in the definition is an offence which is punishable with death. Section 302 of the Indian Penal Code provides:

"Whoever commits murder shall be punished with G death or imprisoment for life and shall also be liable to fine."

One of the punishments for the offence of murder is death and, therefore, the offence of murder would be covered within section 2(4)(i)(a) of the Punjab Act and to such a conviction the Punjab Borstal Act H would have no application. Support for such a view is available from

several decisions of different High Courts. Section 562(1) of the Code of Criminal Procedure of 1898 as amended in 1923 brought in the phrase:

"Punishable with death or transportation for life".

In *Emperor* v. *Mt. Janki & Anr.*, AIR 1932 Nag. 130 that phrase was interpreted disjunctively and women convicted of an offence for which transportation for life was one of the punishments provided were held ineligible for release on probation under section 562. It was pointed out that the words 'death or transportation for life' must be read as referring to offences the penalty for which provided by the Penal Code contains either death or transportation for life as one of the punishments awarded and not necessarily both. Reliance was placed on a full Bench decision of the Rangoon High Court in *King Emperor* v. *Nga San Htwa & Ors.*, AIR 1927 Rangoon 205 which was dealing with a similar phrase occurring in section 497 of the old Code. A Division Bench of the Madhya Pradesh High Court in *Chetti* v. *State of Madhya Pradesh*, AIR 1959 MP 241 also took the same view. In *Emperor* v. *Bahawati*, AIR 1928 Lahore 920 it was held that as one of the alternative punishments for that offence under section 307 of the Penal Code, is transportation for life, it is obvious that section 562 is not applicable and the accused must be sentenced to rigorous imprisonment and fine. The Allahabad High Court in the case of *State* v. *Sheo Shanker*, AIR 1956 All. 326, the Madras High Court in *Public Prosecutor of Madras* v. *Paneswar Rao*, AIR 1946 Mad. 178, the Rajasthan High Court in *Sarkar* v. *Jalam Singh*, AIR 1950 Raj, 28 and the Bombay High Court in *Naranji Premji* v. *Emperor*, AIR 1928 Bom. 244 have taken the same view.

In *Hava Singh's* case the definition was not placed for consideration before the Court and, therefore, the conclusion which has been reached is not correct. The Punjab Borstal Act does not have application to an offence punishable under section 302 IPC. therefore, the conclusion in *Hava Singh's* case is not correct. The petitioner is not entitled to the benefit of the Punjab Borstal Act as he has been sentenced to imprisonment for life for the offence of murder punishable under section 302 IPC for which the sentence of death is prescribed as an alternate.

The writ petition is dismissed.

P.S.S. Petition dismissed.