Sub-Inspector of Police who registered the F.I.R. and P.W.6, Naveen Chandra Nagesh, Inspector of Police who investigated and filed charge-sheet against the accused, who were working during the year 1998 at H3 Tondiarpet Police Station, Madras and report this Court about the action taken against them within a period of two months.

14. A copy of the Judgement shall be sent to the Director General of Police and the Director of Medical Education to take suitable action against the above persons.

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2006 (2) MWN (Cr.) 348 (DB)

IN THE HIGH COURT OF MADRAS
[Madurai Bench]

F.M. Ibrahim Kalifulla and K. Venkataraman, JJ.

Writ Petition (MD) No.4674 of 2006

03.08.2006

P. Shanmuganathan

v.

The Secretary to Government, Home Department, Fort St. George, Chennai and another

T.N. Borstal Schools Act, 1925 – Cr.P.C., Ss.167 & 309

Adolescent Offenders — Detention at pre-conviction stage and after conviction — To be in Borstal Schools and not in regular prison — Judicial Magistrates in State directed to ensure while exercising power u/Ss.167 & 309, Cr.P.C. that Adolescent Offenders are detained in Borstal Schools during pre-conviction stage — Jail Authority directed to transfer such Adolescent Offenders to Borstal Schools.

TAMIL NADU BORSTAL SCHOOLS ACT, 1925, Ss.2(1), 8 to 10-A — CRIMINAL PROCEDURE CODE, 1973, Ss.167 & 309 — CONSTITUTION OF INDIA, Article 226 — Adolescent Offenders — Detention in prisons — Legality — Writ Petitioner seeking issuance of writ of mandamus directing Authorities to transfer Adolescent Offenders to Borstal Schools — Contention that adolescent offender on conviction can only be put under detention in Borstal School and it will be brutal and unlawful for any Court to direct custody of such "adolescent offender" by detaining them in a regular prison — Further contention that though under Borstal Schools Act, detention in Borstal Schools provided for only pursuant to a conviction, it cannot be held that prior to conviction, such Adolescent Offender could be directed to be detained in a regular prison for want of a provision under Act — Following decisions of Supreme Court as also of High Court, *held,* prayer liable to be instantaneously ordered in order to arrest any future mishappening taking place in respect of custody and detention of Adolescent Offender at pre-conviction stage — Though Act does not talk of a treatment to be meted out to

Adolescent Offenders prior to his conviction and states that such offenders can be kept in detention during pre-conviction stage at discretion of concerned Judicial Magistrate for ordering such detention/custody in a regular prison — If after conviction of Adolescent Offender it has been thought by legislature to order such detention only in Borstal School, it will have to be held that at pre-conviction stage also same principle should be applied — Judicial Magistrate concerned, while ordering detention of Adolescent Offender, should ensure that such detention is entrusted with custody of Borstal School and not in regular jail — Any other course adopted by Judicial Magistrate would run counter to object and purport of enactment and same cannot be continued — If Adolescent Offenders allowed to mingle with other adult prisoners in regular jail, same would pave way for them to become hardened criminal instead of getting reformed — High Court directed Judicial Magistrates in State to ensure while exercising power u/Ss.167 & 309, Cr.P.C. that all adolescent offenders are detained in Borstal Schools during pre-conviction stage and not in regular prison — Jail Authority/Second Respondent directed to take statistics of such Adolescent Offenders detained at pre-conviction stage and transfer them to concerned Borstal Schools. (Paras 6-8)

Cases referred —

C. Elumalai v. State of Tamil Nadu, 1985 SCC (Cri) 1.....(Para 3, 5.6)

K. Ramalingam, I.P.S., Inspector General of Prisons, Anna Salai, Madras-2, 1997 (2) L.W. (Cri.) 5671.....(Paras 3, 5.6)

Ramasamy v. State, 2000 (1) L.W. (Cri) 142.....(Para 3)

Sheela Barse (II) and others v. Union of India and others, 1986 SCC (Cri) 352.....(Paras 3, 5.4)

State of A.P. v. Vallabhapuram Ravi, 1984 SCC (Cri) 635.....(Para 3, 5.2)

Finding — WP allowed.

Mr. S. Nagamuthu, Advocate for Petitioner;
Mr. M. Balaguru, Addl. Public Prosecutor for Respondents.

Writ Petition under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus directing the respondents to furnish particulars regarding the adolescent offenders kept in prisons for transferring them immediately to the Borstal Schools established under the Madras Borstal Schools Act.

JUDGMENT/ F.M. Ibrahim Kalifulla, J.—

1. The Petitioner seeks for issuance of a Writ of Mandamus directing the respondents to furnish particulars regarding the 'adolescent offenders' who are kept in prisons for transferring them immediately to the Borstal Schools established under the Madras Borstal Schools Act.

2. This is a public interest litigation. Considering the nature of the relief claimed in the Writ Petition, we sought for the assistance of the learned Additional Public Prosecutor who was graciously be pleased to assist the Court and came forward with an instantaneous solution to the otherwise everlasting misfortune that was prevailing in respect of the 'adolescent offenders' prior to their conviction.

3. The Petitioner is a practising Advocate. Mr. S. Nagamuthu, learned counsel appearing for the Petitioner, by referring to the provisions of the Madras Borstal Schools Act, 1925, Sections 167 and 309 of the Code of Criminal Procedure and the decisions of the Hon'ble Supreme Court in ***State of A.P. v. Vallabhapuram Ravi,*** 1984 SCC (Cri) 635; ***C. Elumalai v. State of Tamil Nadu,*** 1985 SCC (Cri) 1; ***Sheela***

Barse (II) and others v. Union of India and others, 1986 SCC (Cri) 352, as well as the Division Bench decision and the Single Judge's Order of this Court in ***Ramasamy v. State,*** 2000 (1) L.W. (Cri) 142 and ***K. Ramalingam, I.P.S., Inspector General of Prisons, Anna Salai, Madras-2,*** 1997 (2) L.W. (Cri.) 567, respectively, raised a vital contention, namely, that when under Section 2(1) read along with Sections 8 and 10-A of the Madras Borstal Schools Act an adolescent offender, on being convicted, can only be put under detention in a borstal school, it will be brutal and unlawful for any Court to direct custody of such 'adolescent offenders' by detaining them in a regular prison.

4. According to the learned counsel, though under the provisions of the Madras Borstal Schools Act the detention in Borstal School of an adolescent offender is provided for only pursuant to a conviction, it cannot be held that prior to the conviction such an 'adolescent offender' could be directed to be detained in a regular prison for want of a provision under the Madras Borstal Schools Act. Learned counsel submitted that while under Section 167 as well as Section 309 of the Criminal Procedure Code, which provide for the custody of an offender to be determined by the concerned Judicial Magistrate, it is imperative that when such custody is to be ordered in respect of an 'adolescent offender', the custody is directed to be made to a Borstal School having regard to the lofty objects to be achieved under the Madras Borstal Schools Act.

5.1. Having heard the submissions of the learned counsel for the Petitioner, when we called upon the learned Additional Public Prosecutor to respond, the learned Additional Public Prosecutor, without any hesitation, was pleased to state that the stand of the Petitioner is fully justified and that it will be in order for the concerned Judicial Magistrates to direct detention of such 'adolescent offenders' only in Borstal Schools during the pre-trial stage also, if such custody is necessitated either under Section 167 or under Section 309 of the Criminal Procedure Code. The submissions of the learned counsel for the Petitioner as well as the learned Additional Public Prosecutor are also fully supported by the decisions of the Hon'ble Supreme Court, which have been followed by the Division Bench of our High Court.

5.2. In the decision in ***State of A.P. v. Vallabhapuram Ravi,*** 1984 SCC (Cri) 635, the Hon'ble Supreme Court, while dealing with the submission, namely, that Section 10-A of the Andhra Pradesh Borstal Schools Act, 1925 conflict with Section 433-A of the Code of Criminal Procedure, ultimately held as under in paragraph 21:

> "I am, therefore, of the view that Section 433-A of the Code would not operate in respect of persons dealt with under Section 10-A of the Act and that Parliament never intended while enacting Section 433-A to deny the benefit available to adolescent offenders under Section 10-A of the Act. When once this conclusion is reached, the argument that by reason of Article 244 of the Constitution, the Act should yield in favour of a later Central legislation which is repugnant to the Act would not arise because there would be no such repugnancy at all. If Section 433-A of the Code is kept out of the way, Section 10-A of the Act should be interpreted in the same way in which it was understood all along. So construed a person who is detained under Section 10-A of the Act in a Borstal School would have to be released on his attaining 23 years of age. My view receives support from the

decision of the Court in *Kunwar Bahadur v. State of Uttar Pradesh*, 1980 (Supp.) SCC 339, which was a case under the U.P. Borstal Act, 1938, the relevant part of which read thus: *[SCC para 2., p.340: SCC (Cri) P.276]*

> It was then argued that so far as appellant-Nand Kishore is concerned, he appears to be only 15 years at the time when the occurrence took place and it appears that when he was sent to prison the jailor referred him to the Sewa Sadan under Section 7 of the United Provinces Borstal Act, 1938. Under this Section where a prisoner is sentenced for transportation *i.e.* life imprisonment and is below the age of 21 years he should be sent to Borstal School where he cannot be detained for more than five years. The law thus contemplates that for such an offender the sentence of five years will be equivalent even to a higher sentence of life imprisonment. It is not disputed before us that the appellant-Nand Kishore had already served five years in that institution and has been released therefrom. The question, therefore, of his surrendering to serve the remaining sentence does not arise. With this modification the Appeal is dismissed."

5.3. In the decision in ***C. Elumalai v. State of Tamil Nadu,*** 1985 SCC (Cri) 1, the earlier decision reported in *1984 SCC (Cri.) 635* was followed and it was categorically held to the effect—

> "... In the circumstances it has to be held that the State Government of Tamil Nadu cannot keep any adolescent offender who is convicted of a capital offence but sentenced to imprisonment for life in respect of whom an order is made under Section 10-A of the Tamil Nadu Borstal Schools Act in a Borstal School or in any other kind of detention after he has attained 23 years of age. We, therefore, direct the Government of the State of Tamil Nadu to release all such inmates of the Borstal Schools in Tamil Nadu who have attained 23 years of age forthwith."

5.4. In the decision in ***Sheela Barse (II) and others v. Union of India and others,*** 1986 SCC (Cri) 352, the Hon'ble Supreme Court highlighted the National Policy for the Welfare of Children in the following words.

> "*1.* ... Some years ago we came out with a National Policy for the Welfare of Children which contained the following preambulatory declaration:
>
> > The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programmes should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally health, endowed with the skill and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our large purpose of reducing inequality and ensuring social justice.
>
> If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with children provide that a child shall not be kept in jail. Even apart from this statutory prescription, it is

elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society. It is a matter of regret that despite statutory provisions and frequent exhortations by social scientists, there are still a large number of children in different jails in the country as is now evidence from the reports of the survey made by the District Judges pursuant to our order dated April 15, 1986. Even where children are accused of offences, they must not be kept in jails. It is no answer on the part of the State to say that it has not got enough number of remand homes or observation homes or other places where children can be kept and that is why they are lodged in jails. It is also no answer on the part of the State to urge that the ward in the jail where the children are kept is separate from the ward in which the other prisoners are detained. It is the atmosphere of the jail which has a highly injurious effect on the mind of the child, estranging him from the society and breeding in him aversion bordering on hatred against a system which keeps him in jail. We would therefore like once again to impress upon the State Governments that they must set up necessary remand homes and observation homes when children accused of an offence can be lodged pending investigation and trial. On no account should the children be kept in jail and if a State Government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail.

6.5. The decision of the Hon'ble Supreme Court in *1984 SCC (Cri) 635* and *1985 SCC (Cri) 1* has been applied by a Division of our High Court in the decision reported in *2000 (1) L.W. (Crl.) 142* and the Division Bench also referred to the decision of the Supreme Court reported in ***Bhoop Ram v. State of Uttar Pradesh,*** 1989 SCC (Crl.) 486 and has directed as under.

> "*17.* The above view was later quoted with approval by the Supreme Court in ***Elumalai v. State of Tamil Nadu***, AIR 1985 SC 118, holding that the Government of Tamil Nadu cannot keep any adolescent offender who was convicted of a capital offence but sentenced to imprisonment for life in respect of whom an order is made under Section 10-A of the Tamil Nadu Borstal Schools Act in a Borstal School or in any other kind of detention after he has attained 23 years of age.
>
> *18.* In ***Bhoop Ram v. State of Uttar Pradesh***, 1989 SCC (Cri) 486, the Supreme Court held that if the accused has crossed the maximum age of detention in a approved school, the only course to be followed is to sustain his conviction but quash the sentence and released him forthwith."

5.6. Similarly, Mr. Justice M. Karpagavinayagam, taking up a *suo-motu* revision, in the judgment in ***K. Ramalingam, I.P.S., Inspector General of Prisons, Anna Salai, Madras-2,*** 1997 (2) L.W. (Crl.) 567, was pleased to take a serious view of an order passed by the lower Court with regard to an 'adolescent offender' and was pleased to direct as under:

"*17.* It is, therefore, this Court views seriously the Judgment passed by the lower Court, violating the mandate enshrined in Sections 8(1) and 20 of the Madras Borstal Schools Act, while the period of detention of two years has been reduced into one year. It is disquieting to see, that despite the orders of this Court by Justice Maheswaran, (as then was) which has been circulated to all the Subordinate Judicial Officers, and in spite of the mandatory provisions provided under the Act, for passing the minimum detention of two years in the Borstal School, the Subordinate Courts are not careful enough to follow the same. Therefore, it has become necessary again to issue circular, enclosing the copy of this Order, to all the Subordinate Judicial Officers in the State, so that at least in future, the lower Court would pass correct orders, in the light of the above situations.

18. In view of the above reasonings, I am of the view that the impugned Judgment dated 2.1.1996, passed by the learned Additional Sessions Judge, Nagercoil, is liable to be set aside, and is set aside. However, in view of the lapse of considerable period, and for the reason that the detenu has already been released on 25.9.1996 itself, in pursuance of the impugned order, and despite the issue of notice to the detenu, the accused, service has not been effected, due to his non-availability, I am not inclined to re-commit him to custody to undergo the remaining period of detention. A copy of this order is directed to be sent to the Judicial Officer concerned, in name cover, so that he could correct himself in future."

6. On a total analysis of the above referred to decisions and a close reading of the provisions contained in Sections 2(1), 8 and 10-A of the Madras Borstal Schools Act, read along with Sections 167 and 309 of the Criminal Procedure Code, we are convinced that the prayer of the Petitioner has to be instantaneously ordered in order to arrest any future mishappening taking place in respect of the custody and detention of 'adolescent offenders' at the pre-conviction stage. There is no point in stating that the Madras Borstal Schools Act does not talk of a treatment to be meted out to an adolescent offender prior to his conviction and state that such an 'adolescent offender' can be kept in detention during pre-conviction stage at the discretion of the concerned judicial Magistrate for ordering such a detention or custody in a regular prison. If after conviction of an adolescent offender it has been thought of by the legislature to order such detention only in a Borstal School, it will have to be held that at the pre-conviction stage also the same principle should be applied and the Judicial Magistrate concerned, while ordering the detention of an adolescent offender, should ensure that such detention is entrusted with the custody of the Borstal School and not in a regular jail. If any other course is adopted by the Judicial Magistrates, it would run counter to the object and purport of the enactment, namely The Madras Borstal Schools Act, and the same cannot be permitted to be continued.

7. As rightly pointed out by the learned counsel for the Petitioner, if an adolescent offender is allowed to mingle with other adult prisoners in a regular jail, it would only pave the way for an adolescent offender to become more hardened criminal instead of getting reformed and thereby providing scope for the adolescent offender never getting back to the mainstream of life. Therefore, if the object of the Act is to be achieved, it is just and proper

that corrective measures are taken at least now, if not late, and direct the Judicial Magistrates in the State that while exercising their power under Sections 167 and 309 of the Criminal Procedure Code to ensure that all 'adolescent offenders' are, if are to be detained during pre-conviction stage, to be kept in the custody of the concerned Borstal School and not in a regular prison.

8. For the very same reasons, we are of the view that the second respondent can be directed to forthwith take the statistics of the adolescent offenders, who have been detained at the pre-conviction stage, as on date and forthwith order the transfer of such adolescent offenders if they are detained in any regular prison to the concerned Borstal Schools. The second respondent shall carry out the above said exercise within two weeks from the date of receipt of a copy of this order. We also direct the Registry to circulate the copy of this order to all the Judicial Officers in the State in order to scrupulously follow the directions contained in this order and for their future guidance.

9. Before parting with the case, we appreciate the efforts taken by the Petitioner as well as his learned counsel Mr. S. Nagamuthu and we equally appreciate the immediate and unhesitating response of Mr. M. Balaguru, learned Additional Public Prosecutor, while setting forth the legal position as regards the custody of adolescent offenders to be made.

10. The Writ Petition is ordered on the above terms.

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2006 (2) MWN (Cr.) 354

IN THE HIGH COURT OF MADRAS
[Madurai Bench]

G. Rajasuria, J.

Crl.A. No.429 of 2005

29.09.2006

Swaminathan and others

v.

State, represented by Inspector of Police, S.V. Mangalam Police Station, Sivaganagai District

I.P.C., S.493

Ingredients of — No evidence that Accused made victim girl to believe that she had already been married to A.1 — Deceit causing false belief about marriage absent — Conviction u/S.493 set aside.

INDIAN PENAL CODE, 1860, Ss.493 — Offence under — Ingredients of — *(1)* Deceit that causes false belief in existence of lawful marriage — *(2)* Cohabitation or sexual intercourse with person causing such belief — These two ingredients consignify that Accused should have caused a woman in question to belief that there was lawful