

Raghibir

Vs

State of Haryana

Criminal Appeal No. 90 of 1981

(O. Chinnappa Reddy, A.P. Sen, Baharul Islam JJ)

08.09.1981

JUDGMENT

ISLAM, J. –

1. The question for consideration in this appeal by special leave is whether a person under sixteen years of age and accused of an offence under Section 302, Penal Code can get the benefit of the Haryana Children Act, 1974 (hereinafter the Act). The undisputed facts are that the appellant along with three others was convicted of the offence of murder and sentenced to imprisonment of life by the Sessions Judge. The appeal was dismissed by the High Court. The appellant then filed an application for special leave to appeal under Article 136 of the Constitution. [Raghibir v. State of Haryana, (1981) 3 SCC 170] Leave was granted confined to the question of the applicability of the Act to his case. It is also not disputed that the appellant was less than sixteen years at the time he first appeared before the trial court. He was thus a 'child' within the meaning of that term under clause (d) of Section 2 of the Act.
2. Mr. Prem Malhotra, learned counsel appearing for the appellant, submitted that in view of Section 5 of Criminal Procedure Code, 1973 (hereinafter called the Code), the appellant would get the benefit of the Act; while on the other hand, Mr. Bhagat appearing for the State, relying on Section 27 of the Code submitted that an offence punishable with death or imprisonment for life would not be triable under the Act.
3. There is a decision of this Court on the point in the case the Rohtas v. State of Haryana [(1979) 4 SCC 229 : 1979 SCC (Cri) 963] that held the trial of a child under the provisions of the Act was not barred. In that case, however, it appears, Section 27 of the Code was not brought to the notice of the Court. In that view of the matter, the Bench consisting of two members including one of us (Baharul Islam, J.) before whom this appeal [Raghibir v. State of Haryana, (1981) 3 SCC 170] came up for hearing referred it to a larger Bench, in order to avoid possible conflict of decisions. This is how this appeal came up for hearing before this Bench consisting of three members.
4. Mr. Malhotra submits that Section 5 of the Code leaves special and local laws unaffected by the provisions of the Code and that, therefore, the Act remains wholly intact. On the other hand, Mr. Bhagat's submission is that all offences are triable under the Act by reason of the provision of Section 27 of the Code so long as they fall within the category of offences "not punishable with death or imprisonment for life".
5. In the Act, 'child' has been defined as meaning a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years. 'Delinquent child' has been defined as

meaning a child who has been found to have committed an offence.

6. Apart from procedural differences in the Act and the Code, for the trial of child for murder, the outstanding difference is that the trial of the child under the Code may end in the sentence of death or imprisonment for life while a child cannot be sentenced to death or imprisonment for life under the Act. In order to better appreciate the differences, it is necessary to refer to some of the salient provisions of the Act.

7. Sub-section (1) of Section 4 provides for the constitution of a children's court. It provides that notwithstanding anything contained in the Code of Criminal Procedure, 1898 (hereinafter the old Code), the State Government may constitute one or more children's courts for exercising the powers and discharging the duties conferred or imposed on such court in relation to delinquent children under the Act. Sub-section (3) of Section 5 provides that a person may be appointed as a member of the Board or as a magistrate in the children's court only where he has, in the opinion of the State Government, knowledge of child psychology and child welfare. Sub-section (1) of Section 6 of the Act provides that where a Board or a children's court has been constituted for any area, such Board or court shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in the Act, have power to deal exclusively with all proceedings under the Act relating to neglected children or delinquent children, as the case may be. Section 8 provides for establishment of children's homes, Section 9 for special schools, Section 10 for observation homes and Section 11 for the establishment of after-care organisations. Section 17 provides for the bail and custody of delinquent children. It provides that a child accused of any non-bailable offence, notwithstanding anything contained in the old Code or in any other law for the time being in force be released on bail with or without surety unless such release defeats the purpose of the Act. Section 19 provides that the children's court shall hold an inquiry against the child charged with an offence in accordance with the provisions of Section 37 of the Act and may, subject to the provisions of the Act, make such order in relation to the child as it deems fit. Section 20, inter alia, provides that where a children's court is satisfied on inquiry that a child has committed an offence, then notwithstanding anything to the contrary contained in any other law for the time being in force, the children's court may, if it thinks fit, -

(a) allow the child to go home after advice or admonition;

(b) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian, or other fit person on his executing a bond with or without surety as the court may require for the good behaviour and well-being of the child for any period not exceeding three years; and

(c) make an order directing the child to be sent to a special school.

Section 21 is important. It prohibits passing of certain orders against delinquent children. It provides, inter alia, that notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent child shall be sentenced to death or imprisonment or committed to prison in default of payment of fine or in default of furnishing security. Section 23 bars the joint trial of a delinquent child with any other person who is not a child. Sub-section (2) of Section 23 enjoins separation of trials of a delinquent child and a person who is not a child, when they are sent up in the same case.

8. Sub-section (1) of Section 65 which is important is in the following terms :

The Reformatory Schools Act, 1897 (Central Act 8 of 1897), and Sections 29-B and 399 of the Code of Criminal Procedure, 1898 (Central Act 5 of 1898), shall cease of apply to any area in which this Act has been brought into force.

9. Section 29-B of the old Code is equivalent to Section 27 of the Code. Section 399 of the old Code provided for confinement of the delinquent children in reformatories after conviction instead of sending them to prison.

10. It may be mentioned that there are similar provisions in the central Children Act, 1960 (Act 60 of 1960) which is applicable to the Union Territories only. Section 22 of this Act is in pari materia with Section 21 of the Haryana Children Act. A perusal of the above and other provisions of the Act and those of the central Children Act shows that the procedure for trial, conviction and sentence under the Children Acts are simple, humane and by courts manned with persons with knowledge of child psychology and child welfare; but not so under the Criminal Procedure Codes of 1898 and 1973. The intention of the State legislature of Haryana and of the Parliament in enacting the Children Acts was to make provisions for trial of delinquent children and dealing with them in accordance with such procedures, so that the delinquent children do not come in contact with accused persons who are not children and but are hardened criminals. The purpose undoubtedly was to reclaim delinquent children and rehabilitate them in such a way that they become useful citizens later in life.

11. It may be mentioned at this stage that the Act came into force on March 1, 1974 while the Code of Criminal Procedure, 1973 came into force in April 1, 1974. If there be any conflict between any provisions of the Act and the Code, in view of Article 254(1) of the Constitution, the provision of the Act repugnant to any provision of the Code will be void to the extent of repugnancy.

12. It was not the contention of Mr. Bhagat appearing for the State that the Act was bad for lack of legislative competence of the State Assembly or for any other reason. The sheet-anchor of his submission was Section 27 of the Code of 1973.

13. Let us now set out the relevant provisions of the Code of Criminal Procedure, 1973 with which we are directly concerned.

14. Section 4 reads :

(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

15. Section 5 reads :

Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

16. Section 27 reads :

Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the court is under the age of sixteen years, may be tried by the court of Chief Judicial Magistrate, or by any court specially empowered under the Children Act, 1960, or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

17. Putting emphasis on the expressions, "in the absence of any specific provisions to the contrary", occurring in Section 5, Mr. Bhagat submits that Section 27 is the specific provision to the contrary and as such this provision shall affect the Haryana Children Act which is a local law for the time being in force. We are unable to accept the submission. As it has been pointed out above, the purpose of the Haryana legislature as well as of the Parliament in enacting the Haryana Children Act and the central Children Act (Act 60 of 1960) respectively was to give separate treatment to delinquent children in trial, conviction and punishment for offences including offences punishable with death or imprisonment for life. In our opinion, Section 27 is not "a specific provision to the contrary", within the meaning of Section 5 of the Act; the intention of the Parliament was not to exclude the trial of delinquent children for offences punishable with death or imprisonment for life, inasmuch as Section 27 does not contain any expression to the effect "notwithstanding anything contained in any Children Act passed by any State legislature". Parliament certainly was not unaware of the existence of the Haryana Children Act coming into force a month earlier or the central Children Act coming into force nearly fourteen years earlier. What Section 27 contemplates is that a child under the age of sixteen years may be tried by a Chief Judicial Magistrate or any court specially empowered under the Children Act, 1960. It is an enabling provision, and, in our opinion, has not affected the Haryana Children Act in the trial of delinquent children for offences punishable with death or imprisonment for life.

18. Criminal Procedure appears in item 2 of the Concurrent List of the Seventh Schedule of the Constitution. One of the circumstances under which repugnancy between the law made by the State and the law made by the Parliament may result is whether the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable. In the case in hand as we have shown that the relevant provisions of the Code and the Act can co-exist. Their spheres of operation are different.

19. Mr. Bhagat in support of his contention has relied on a Full Bench decision of the Madhya Pradesh High Court in *Devi Singh v. State of M.P.* [1978 Cri LJ 585]. The Full Bench of three judges considered the jurisdiction of the Madhya Pradesh Bal Adhiniyam, 1970 (15 of 1970) to try a juvenile offender for offences punishable with death or imprisonment for life. There was a difference of opinion. The view of the majority was that the juvenile courts constituted under the Madhya Pradesh Bal Adhiniyam have exclusive jurisdiction to try a delinquent child (a person under sixteen years of age) for all offences except those punishable with death or imprisonment for life even after the commencement of the Code of Criminal Procedure, 1973 (Act 2 of 1974), while the minority view of Verma, J. who to the contrary. With respect, the majority view is erroneous. Verma, J. has observed as follows :

The only question before us is whether the provisions of the new Code have brought about any change in this position. There can be no doubt that if there is an irreconcilable conflict between the provisions of the new Code and those of the Bal

Adhiniyam, then the new Code being the later central enactment it will supersede Bal Adhiniyam, the earlier State enactment to the extent of repugnancy by virtue of clause (1) of Article 254 of the Constitution. The real question, therefore, is whether there is any such repugnancy between the two enactments so as to attract Article 254. It is equally clear that if there is no such repugnancy and the relevant provisions of the two enactments are capable of co-existence, then Article 254 would not be attracted, and the provisions of the Bal Adhiniyam conferring exclusive jurisdiction on the juvenile courts to try all offences including those punishable with life imprisonment or death would continue to operate. Such a conclusion is supported also by the fact that the Bal Adhiniyam is a special local Act while the new Code is a general enactment applicable throughout the country on account of which the special local Act would apply within this State in preference to the general law on the subject. It is in this light that the question has to be examined with a view to determine whether there is any such irreconcilable conflict so as to attract Article 254 of the Constitution. This is the real question for decision.

He has held :

Applying the tests indicated by the settled principles, I have no hesitation in holding that there is no real conflict between the provisions of the new Code, particularly Section 27 thereof, and the provisions of the Bal Adhiniyam. In short, the provisions of the new Code clearly save any special or local law like the Bal Adhiniyam and Section 27 of the new Code is merely an enabling provisions which does not express any contrary intention to undo the saving provided in Section 5 of the new Code. There being thus no conflict or repugnancy, the question of Article 254 of the Constitution being attracted does not arise.

With respect, Verma, J. has expressed the correct opinion.

20. As a result of the foregoing discussions, we allow the appeal, set aside the conviction and sentence imposed upon the appellant and quash the entire trial of the appellant. We direct that the appellant shall be dealt with in accordance with the provisions of the Haryana Children Act.

21. It is a pity that the point urged before us was not urged in any of the courts below.

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