

# CALCUTTA HIGH COURT

Dilip Saha

Vs.

State (Calcutta)

Full Bench Reference No. 1 of 1978

(Sankar Prasad Mitra, C.J., S.K. Datta and A.N. Banerjee, JJ.)

**25.07.1978**

## JUDGEMENT

### **Sankar Prasad Mitra, C.J.**

1. A Division Bench consisting of Barooah and Majumdar, JJ. has referred this Rule to a Full Bench in accordance with the provisions of Chapter VII of the Appellate Side Ruled. The question for determination by Che Full Bench is as follows:-

"For the purpose of determining whether an accused is a child or not within the meaning of Section 28 of the West Bengal Children Act (Act XXX of 1959), is the age to be determined with reference to the date of commission of the offence or when the accused is charged with the offence and is brought to trial or some other date."

2. Section 28 of the West Bengal Children Act, 1959 runs thus:

"28. (1) notwithstanding anything to the contrary contained in Section 239 of the Criminal Procedure Code, 1898, or any other law for the time being in force, no child shall be charged with or tried for, any offence together with an adult.

(2) Where a child and an adult are accused of an offence for which under Section 239 of the Criminal Procedure Code, 1898, or any other law for the time being in force, they would, but for the prohibition contained in sub section (1), be charged and tried together, the court taking cognizance of the offence shall direct separate trials of the child and the adult."

3. Under Section 8 (1) of the General Clause Act, 1897 the references to the Criminal Procedure Code, 1898 in Section 28 of the West Bengal Children Act, 1959 have to be construed as references to corresponding provisions in the Criminal Procedure Code, 1973.

4. On the question referred to the Full Bench there are two conflicting decisions of two Division

Benches of this Court. The first decision was of Barooah, and H. N. Sen, JJ. in *Madan Proadhan v. State of West Bengal, reported in*<sup>1</sup> The judgment was delivered on Jan.

<sup>1</sup>1978 (1) Cal LJ 224

7, 1976. In this case it was admitted that the appellant had not attained the age of 18 years on the date of commission of the offence. In other words, on the date of the offence the appellant was a child within the meaning of Section 2 (d) of the West Bengal Children Act, 1959. Section 28 (1) of the Act, as we have seen, prohibits a joint trial of a child and an adult. In spite thereof, the appellant was tried along with one Kartick Debnath on a charge under Section 302 Indian Penal Code, on the allegation that the appellant with the other accused had, on March 24, 1973, committed murder intentionally or knowingly by causing death of one Ramlal in furtherance of a common intention of them both. The Sessions Judge found the accused persons guilty of the charge and sentenced each of them to suffer imprisonment for life.

5. The question that arose before the Division Bench was whether or not after the new Criminal P. C. came into force, the provisions of the said Act would cease to apply to cases of juvenile delinquents.

6. The Division Bench has held that Section 5 of the Code of 1973 has saved the operation of local or special laws. In other words, such laws would remain unaffected by the Code unless there is any specific provision to the contrary either in the Code itself or in any local or special law. Section 27 of the Code permits trial of a juvenile by the Courts of certain Magistrates, where the offence committed is not punishable with death or imprisonment for life. This section does not in any way affect the provisions of the 1959 Act nor has it taken away the jurisdiction conferred by the said Act. The appellant being a "child" on the date of the commission of the offence for which he was convicted, his trial along with Kartick who was an adult, the Division Bench said, was clearly without jurisdiction as the said trial was held in contravention of the specific provisions of Section 28 (1) of 1959 Act. That being so, the conviction and the sentence so far as the appellant was concerned, were liable to be set aside.

7. The other Division Bench judgment we have referred to was that of Chanda and Sudhamay Basu, JJ. in *Govinda Chandra Bhowmick v. State of West Bengal reported in*<sup>2</sup> In this case the petitioner along with two other accused persons were committed to Sessions on a charge under Section 304/34, Indian Penal Code and Section 27 of the Arms Act. Before the Sessions Court the petitioner submitted that he was 17 years 5 months old when the alleged offence was committed and, as such, he was a child and could not be tried with the other adult accused persons. As the question of jurisdiction was raised, the learned Sessions Judge gave leave to the petitioner to move the High Court and the High Court issued a Rule. On a consideration of the relevant sections of the 1959 Act the learned Judges before whom the Rule came up for hearing thought that age to be calculated for the purpose of Section 28 was the age when a person was brought before a court to be dealt with and not when he committed the offence. But in view of the contrary opinion expressed by an earlier Division Bench, the learned Judges made a reference to a Full Bench. The Full Bench refrained from giving any answer to the question raised as the facts in Madan Proadhan's case were different from those in Gobinda Chandra Bhowmick's case. The Full Bench thought that the answer would be academic. When the matter went back to the Division Bench it was held that whether a person was a child or not had to be determined not with reference to the date of the commission of the offence but with reference to the date when the person was brought

<sup>2</sup>(1977) 4 Cal HC (N) 572

before the Court to be dealt with.

8. The facts in the instant case are similar to those in Gobinda Chandra Bhowmick's case. In Govinda's case the petitioner, who was a child on the date of the offence, was committed to the Sessions Court along with two other accused persons. Before the Sessions Court the petitioner submitted that he was a child within the meaning of the 1959 Act. The Sessions Judge gave leave to the petitioner to move the High Court and the High Court issued a Rule. The High Court discharged the Rule holding that whether a person was a child or not had to be determined not with reference to the date of the commission of offence but with reference to the date when the person was brought before the Court to be dealt with.

9. In the instant case also the point of jurisdiction was taken after the accused had been committed to the Sessions Court, charges were framed by the Sessions Judge and a date was fixed for evidence. The Sessions Judge has also determined the age of the accused and it appears that the accused was a child within the meaning of the 1959 Act on the date of commission of the offence. The Sessions Judge has passed an order that he has jurisdiction to proceed with the trial. That order has been challenged in this Rule. Barooah and Majumdar, JJ. presumably were of a view different from the view expressed by the Division Bench in Gobinda Chandra Bhowmick's case (1977 Cri LJ 1501) (Cal) and have referred the matter to the Full Bench.

10. The question for determination of the Full Bench is the relevant date for attracting the provisions of the West Bengal Children Act, 1959. We have to decide whether what is relevant is the age of the offender on the date of the commission of the offence or the age of the offender at the time of his trial.

11. To appreciate the point involved we have to refer to the object of the legislation. The preamble to the 1959 Act says that it is : "an Act to consolidate and amend the law relating to the custody, protection, treatment and rehabilitation of juvenile delinquents and of other children in need of care and protection. the trial of juvenile delinquents and certain other matters". Then it says :

"WHEREAS it is expedient to consolidate and amend the law relating to the custody, protection, treatment and rehabilitation of juvenile delinquents and of other children in need of care and protection, the trial of juvenile delinquents and certain other matters specified herein, including the education of such juvenile delinquents and other children; It is hereby enacted in the Tenth Year of the Republic of India, by the Legislature of West Bengal, as follows :-"

12. The object of the legislation, therefore, was to consolidate and amend the law relating to the custody, protection, treatment and rehabilitation of juvenile delinquents and other children in need of care and protection, the trial of juvenile delinquents and certain other matters including their education obviously to bring them up as useful and responsible citizens. In other words the object of the legislation was reformation and rehabilitation of juvenile delinquents instead of simply inflicting punishment for offences committed by them.

13. Section 2 (h) of the Act defines a "Juvenile Delinquent". He is a child who has been found to have committed an offence. The words 'child' has also been defined in Section 2 (d). He is a

person who has not attained the age of 18 years. These two definitions seem to suggest that the date of the commission of the offence is of paramount importance for the purposes of the West Bengal Children Act, 1959. This is a special Act which provides, amongst others, for procedure for trial and the venue of trial of a juvenile delinquent. The operation of the general law is excluded in such cases.

14. Not only does this Act require a special procedure for enquiry in the case of a juvenile delinquent, it also confers on a juvenile delinquent certain rights not enjoyed by an adult. For instance, Section 22 provides that a child who has been arrested or detained on a charge for any offence whether bailable or not may be released on bail with or without surety unless there are reasonable grounds to believe that his release is likely to bring him under the influence of any criminal or expose him to moral danger or defeat the ends of justice. Section 24 provides that no juvenile delinquent shall be sentenced to death. It also provides that no juvenile delinquent shall be sentenced to imprisonment or committed to prison in default of payment of fine or in default of furnishing security unless of course the court is satisfied that the offence which the Juvenile delinquent is charged with is of a serious nature or that he is so unruly or of so depraved a character that he is not a fit person to be sent to a reformatory or borstal school. In that case the court may sentence him to imprisonment. Section 27 provides that no proceeding shall be instituted and no order shall be passed against a child under the provisions of Section 107 and other similar provisions of the Criminal Procedure Code. Section 49 provides that a conviction of a child shall not be regarded as a disqualification attaching to conviction for an offence.

15. These provisions of the 1959 Act indicate that the legislature wanted to place juvenile delinquents on a different footing. They were not to be apprehended and tried in the same manner as adult offenders. The legislature's intention was to make certain beneficial provisions for juvenile delinquents. These beneficial provisions are rights vested in a juvenile delinquent on the day the offence is committed. He cannot be denied of them by reason of the fact that at the time of actual trial he has become an adult within the meaning of Section 2 (a) which defines an adult. An "adult" means a person who is not less than 18 years of age.

16. In this connection we may refer to the provisions of Section 3 of the 1959 Act which, it seems to us, makes the intention of the legislature fairly clear. It provides : "Notwithstanding anything to the contrary contained in this Act, if during the course of any proceeding under this Act a child attains the age of 18 years the proceeding may be continued and orders may be made under this Act in respect of him as if he was a child."

17. Although Section 3 speaks about a proceeding under the 1959 Act, it reflects to some extent the mind of the legislature. That intention clearly is that if on the date of the commission of offence a person is a 'child' and is brought before the court for trial under the provisions of the 1959 Act, his trial would continue in accordance with the said provisions even after he has attained the age of 18. In other words, the attainment of the age of 18 is no bar to trial of a juvenile delinquent under the provisions of the 1959 Act.

18. Let us now come to Section 40 which is as under :

"Whenever any person is brought before a Court to be dealt with under any of the provisions of this Act, as a child the court shall make due enquiry as to the age of that

person and also, for the purposes of Section 41, as to his religious persuasion and shall, after taking such evidence as may be forthcoming, record a finding whether the person is a child or not and what his age is. The age so found by the Court shall, for the purposes of this Act, be deemed to be the true age of such person."

19. This section obviously casts an obligation upon the person who is producing the accused before the Court to inform the Court about the necessity of due enquiry as to his age and thereafter it becomes the duty of the Court to determine the age of the person produced before it and record a finding relating to his age. The age so recorded shall be deemed to be the true age of the accused for purposes of trial and punishment.

20. Now, supposing either the officer producing the offender or the Court fails to perform the duties cast on them by Section 40, it cannot be urged that a juvenile delinquent's right to be treated under the provisions of the 1959 Act is taken away. On the contrary, in course of the proceeding or even at the stage of trial if it is found or brought to the notice of the Court that the offender at the time of the commission of the offence was a child, it has no other alternative but to split the case and direct a separate trial under Section 28 of the Act which runs thus :

"Section 28 (1). Notwithstanding anything to the contrary contained in Section 239 of the Criminal P. C., 1898, or any other law for the time being in force, no child shall be charged with, or tried for, any offence together with an adult.

(2) Where a child and an adult are accused of an offence for which under Section 239 of the Criminal P. C., 1898, or any other law for the time being in force, they would, but for the prohibition contained in sub section (1) be tried and charged together, the court taking cognizance of the offence shall direct separate trial of the child and the adult."

21. Section 28 (1) imposes a bar to joint trial of a child and an adult. It also imposes a bar to a child being charged with an offence jointly with an adult at even the initial stage. Section 28 (1) speaks of two stages, namely, (i) accusation at the initial stage and (ii) the stage of trial. The word 'or' between the words "charged with" and "tried for" is significant. Section 28 does not say that if a person was a child at the time of commission of the offence, but became an adult at the time of trial, he would be deprived of the benefits conferred by the 1959 Act.

22. If we interpret Section 28 to mean that it prohibits a joint trial of a child and an adult only when the child is a 'child' at the time of trial, that interpretation would go against the provisions of Article 20 (1) of the Constitution which prescribes that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

23. If, therefore, at the time of the commission of the offence a child cannot be sentenced to death or ordinarily imprisoned in view of Section 24 of the West Bengal Children Act, 1959, he cannot be subjected to a greater penalty at the time of his trial even if he becomes an adult at the time of trial. It may be argued that when a child has become an adult at the time of trial, his trial may proceed in accordance with provisions of general law; but in awarding sentence the court

would take into account the provisions of Section 24 of the 1959 Act. But that argument would lead to anomalies. A recourse to Section 24 can be made only if a due enquiry is held in accordance with the provisions of the West Bengal Children Act, 1959.

24. There is another aspect of the matter. It may happen that the accused was a child at the time of commission of the offence, but the investigating officer takes an unusually long time to complete the investigation and put the accused on trial. In such cases if the benefits of the 1959 Act are denied to the accused because of laches of the investigating officer, the whole object and purpose of the Act would be defeated.

25. The learned Public Prosecutor appearing for the State, has conceded before us the following points:-

1. The obligation is upon the authority, that is, the police to bring to the notice of the Court that the delinquent is a child. No reciprocal duty is cast upon the child to bring it to the notice of the Court. But by way of defence he has the right to agitate the same and the Court is bound to take into consideration his age at the time of commission of the offence for the ends of justice.

2. The intention of the legislature is that a "child" remains a "child" throughout the proceedings under the 1959 Act even though he has crossed the prescribed age.

3. It is a welfare legislation and any attempt to apply the rigours of law to a person who was a child at the date of the commission of the offence would defeat the object of the 1959 Act.

26. We, therefore, hold that the age of the accused at the time of the commission of the offence is the relevant age for attracting the provisions of the West Bengal Children Act, 1959 and not his age at the time of trial.

27. In the result, this Rule is made absolute. The orders of the learned Sessions Judge, City Sessions Court, Calcutta, Bench 2, dated the 23rd April, 1976 framing charge against the petitioner and his order dated the 26th May, 1976 directing joint trial of the petitioner with the adult accused are set aside and quashed. We direct that the petitioner be tried afresh under the provisions of the West Bengal Children Act, 1959. We direct further that the records be sent back forthwith to the said learned Sessions Judge for forwarding the petitioner and the records to the appropriate Court for trial of the petitioner.

**S.K. Datta, J.**

28. I agree.

**A.N. Banerjee, J.**

29. I agree.

Rule made absolute.

