Gopi Nath Ghosh vs State Of West Bengal on 11 November, 1983

Equivalent citations: 1984 AIR 237, 1984 SCR (1) 803

Author: D.A. Desai

Bench: D.A. Desai, Amarendra Nath Sen

PETITIONER:
GOPI NATH GHOSH

Vs.

RESPONDENT:
STATE OF WEST BENGAL

DATE OF JUDGMENT11/11/1983

BENCH:
DESAI, D.A.
BENCH:
DESAI, D.A.
SEN, AMARENDRA NATH (J)

CITATION:
1984 AIR 237 1984 SCR (1) 803
1983 SCALE (2)756
CITATOR INFO :
RF 1987 SC1501 (2,9)

ACT:
Justice to Children-Constitution of India, 1950 Article 39 (f) read with Article 136-Court will not allow a technical contention of non-maintainability of appeal on the ground a New Plea is taken for the first time, when the Trial is vitiated for non-observance of the Provisions of a benevolent statute-West Bengal children Act, 1959, Sections 2 (d), 2 (b), 4 to 6, 22, 23, 24 (2) and 26, scope of-Practice Directions-Guidance to Courts below for dealing with case against juvenile Delinquents.

HEADNOTE:
The appellant, Gopinath Ghosh along with Bharat Ghosh @ Sadhu, and Jagannath Ghosh, was convicted and sentenced to life imprisonment under Section 302 read with Section 34 I.P.C. for having committed the murder of Rabi Ghosh, son of

Kartik Ghosh on August 19, 1974. The High Court in appeal, accepted the plea of the two other accused only and acquitted them, while confirming the conviction and sentence of the appellant. The appellant for the first time in the Supreme Court raised the New Plea that as he was a "child" within the meaning of the expression in West Bengal Children Act, 1959, the entire trial was vitiated. The court, by its order dated March 11,1983 directed the Session Judge Nadiar to give a finding on the age of the appellant on the date of the occurrence. The Sessions Judge, in his report, after detailed examination of the evidence of Chief Medical officer of Health, Nadia, (PWI), Radiologist (PW2) orthopaedic Surgeon (PW3), another doctor Mr. R.B. ROY (PW4), the mother of the appellant (PW5) and the Headmaster of the School who brought records of the School, gave a finding that the appellant was aged between 16 and 17 years on the date of occurrence i.e. on August 19, 1974, which finding is not challenged by the State.

Allowing the appeal by Special leave, the Court,

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HELD: 1.1 A combined reading of Sections 2(d), 2(h), 4 to 6, 22, 23, 24 (2) and 26 of the West Bengal Children Act, 1959 makes it clear that where a juvenile delinquent is arrested, he/she has to be produced before a juvenile court, and if no juvenile court is established for the area amongst others, the court of Session will have powers of a juvenile court; (b) such a juvenile delinquent ordinarily has to be released on bail irrespective of the nature of the offence alleged to have been committed unless it is shown that there appears reasonable grounds for believing that the release is likely to bring him under the influence of any criminal or expose him to moral danger or defeat the ends of justice; (c) Section 25 forbids any criminal or a juvenile delinquent and only an inquiry can be held in accordance with the provisions of the code of Criminal
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Procedure for the trial of a summons case; and (d) the bar of Section 24 which had been given an over riding effect as it opens with the non-obstante clause takes away the power of the court to impose a sentence of imprisonment unless the case falls under the proviso. [808 A-C

1.2 In the instant case, the entire trial of the appellant is without jurisdiction and is vitiated. The report of the Sessions Judge unquestionably established by unassailable evidence that the appellant having been 16 to 17 years of age on the date of occurrence was a juvenile delinquent and therefore the Magistrate could not have committed his case to the court of Session. Only an inquiry could have been held against him as provided in Section 25 of the Act unless the case of the appellant falls within the proviso to Section 24 (2). [808 H, 809 A-B]

1.3 ordinarily, the Supreme Court would be reluctant to entertain a based on factual averments for the first time

before it. However, the court is equally reluctant to ignore, overlook or nullify the beneficial provisions of a very socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in court. In view of the underlying intendment and beneficial provisions of the Act read with clause (f) of Article 39 of the Constitution which provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that child hood and youth are protected against exploitation and against moral and material abandonment, it would not be proper to allow a technical contention that the plea is being raised for the first time in the court and thereby thwart the benefit of the provisions being extended to the appellant, if he was otherwise entitled to it. [809 F; 808 F-H]

Practice Directions:

Whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before proceeding with the trial or under taking an inquiry, an inquiry must be made about the age of the accused on the date of occurrence. This sought to be made so where special Acts dealing with juvenile delinquents are in force. If necessary, the Magistrate may refer the accused to the medical-Board or the Civil Surgeon, as the case may be, for obtaining credit worthy evidence about age. The magistrate may as well call upon accused also to lead evidence about his age. Thereafter, the learned Magistrate may proceed in accordance with law. This procedure, if properly followed, would avoid, a journey upto the apex court, and the return journey to the gross-root court. [809 H; 810 A-B]

(The court suggested, that if necessary an found expedient, the High Court, on the administrative side may issue necessary instructions to cope with such situation). [810 B]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 623 of 1983.

Appeal by Special leave from the Judgment and order dated the 17th January, 1982 of the Calcutta High Court in Crl. Appeal No. 160 of 1977.

P. K. Chakraborty for the appellant.

G. S. Chatterjee for the respondent.

The Judgment of the Court was delivered by DESAI, J. Special leave granted.

Appellant Gopinath Ghosh was convicted by the learned Additional Sessions Judge, Nadia along with Bharat Ghosh @ Sadhu and Jagannath Ghosh under Sec. 302 read with Sec. 34 of the Indian Penal Code for having committed murder of Rabi Ghosh, son of Kartick Ghosh on August 19, 1974, Appellant Gopinath Ghosh is alleged to have caused an injury with a fala which landed on the left side chest below the neck of deceased Rabi. Information of the offence was lodged by Kartick Ghosh, father of deceased Rabi at Nakashipara Police Station at about 3.40 P.M. On the date of the occurrence. After completing the investigation, appellant and two others were charge-sheeted for an offence under Sec. 302 read with Sec. 34 of the Indian Penal Code. The learned Magistrate committed the case to the Court of Sessions. The case came up for trial before the learned Additional Sessions Judge, Nadia who on appraisal of evidence held that appellant Gopinath Ghosh has caused the fatal injury in furtherance of the common intention of all the three accused and accordingly convicted them for an offence under Sec.302 read with Sec. 34 of the Indian Penal Code and sentence each of them to suffer imprisonment for life.

Appellant and the two co-accused preferred Criminal Appeal No. 160 of 1977 in the Calcutta High Court. A Division Bench of the High Court held that it is satisfactorily established that the present appellant caused the injury with a fala to deceased Rabi which proved fatal and therefore, the charge under Sec, 302 I.P.C. is brought home to him. The High Court further held that it is not shown that the two co-accused Bharat Ghosh @ Sadhu and Jagannath Ghosh shared the common intention with the present appellant and accordingly allowed their appeal and set aside their conviction and sentence and acquitted them of all the charges.

Appellant Gopinath Ghosh has filed this appeal by special leave.

Learned counsel who appeared for the appellant urged that on the date of the offence i.e. on August 19, 1974, appellant was aged below 18 years and was therefore a 'child' within the meaning of the expression in the West Bengal Children Act, 1959 ['Act' for short) and therefore, the Court had no jurisdiction to sentence him to suffer imprisonment after holding a trial, In view of this contention, the Court by its order dated March 11, 1983 framed the following issue for determination:

> "What was the age of the accused Gopinath Ghosh (appellant) on the date of the offence for which he was tried and convicted ?"

and remitted the issue to learned Sessions Judge, Nadia to certify the finding after giving an opportunity to both sides to lead oral and documentary evidence. Liberty was reserved with the learned Sessions Judge to send accused Gopinath Ghosh to Chief Medical officer, Nadia to ascertain his age.

on receipt of the order made by this Court, the learned Additional Sessions Judge, First Court, Nadia directed Superintendent of Krishnagar Jail to produce accused Gopinath Ghose in the office of the Chief Medical Officer, Nadia on June 4,1983 for medical examination with a view to ascertaining his age and submit the report to the court. Thereafter, the prosecution examined P.W. 1 Dr. A. K. Basu, Chief Medical officer of Health, Nadia, P.W. 2 Dr. J. C. Debnath, Radiologist, P.W. 3 Dr. C. R. Bhattacharyya, orthopaedic Surgeon and P.W. 4 Dr. R. B. Roy. Thereafter, Smt. Bhaktabala Dasi,

mother of the appellant was examined as a witness for the defence. The case was adjourned as the appellant wanted to examine Mangalmoy Sarkar, Headmaster of Sudhakarpur High School to prove entries from the Admission Register. That request was granted and the Headmaster was examined. The learned Additional Sessions Judge after hearing both the sides certified his finding that appellant Gopinath Ghosh was aged between 16 and 17 years on the date of the offence i.e. On August 19,1974. This finding is not questioned before us.

Sec. 2(d) of the Act defines 'child' to mean a person who has not attained the age of eighteen years. Sec. 2(h) defines 'Juvenile delinquent' to mean a child who has been found to have committed an offence. Fasciculus of sections in Chapter III bears the heading 'Juvenile delinquents'. Sec. 22 provides for granting bail to a child pending inquiry. Sec. 23 casts an obligation on the officer in-charge of the police station to which a child is brought after arrest to forth with inform the parent or guardian of the child, if he can be found, of such arrest and shall cause to be summoned to the Court before which the child will appear. Sec. 24 starts with a non obstante clause which takes away the jurisdiction of the Court to impose a sentence of death on a juvenile delinquent as well as the power to impose sentence of imprisonment or commitment to prison in default of payment of fine or in default of furnishing security on a juvenile delinquent. There is a proviso to sub-cl.(2) of Sec. 24 which would enable the Court to impose a sentence of imprisonment on a juvenile delinquent, if the conditions therein prescribed are satisfied with an obligation on the Court to report the case to the State Government and direct the juvenile delinquent to be detained in such custody as it may think fit. Sec. 25 provides for inquiry by Court regarding juvenile delinquents. It reads as under:

> "Where a child having been charged with an offence appears or is produced before a Court, the Court shall hold the inquiry in accordance with the provisions in the Code of Criminal Procedure, 1898, for the trial of a summons case."

Sec. 26 confers power on the Court enabling it to pass orders regarding juvenile delinquents as therein mentioned.

Sec. 4 confers power on the State Government to establish Juvenile Courts by a notification to be issued in that behalf. Sec, 5 provides that the powers conferred on Courts by the Act shall be exercised amongst others where a Juvenile Court is not established by a Court of Session. It is not clear whether juvenile court has been established for the area comprised in District Nadia. Sec. 6 provides that when a child is brought before a Magistrate or Court not empowered to pass an order under the Act, such Magistrate or Court shall forward the child to the nearest juvenile court or other Court or Magistrate having jurisdiction.

It clearly transpires from a combined reading of the sections hereinbefore extracted that where a juvenile delinquent is arrested, he/she has to be produced before a juvenile court and if no juvenile court is established for the area amongst others, the Court of Session will have produces of a juvenile court. Such a juvenile delinquent ordinarily has to be released on bail irrespective of the nature of the offence alleged to have been committed unless it is shown that there appears reasonable grounds for believing that the release is likely to bring him under the influence of any criminal or expose him to moral danger or defeat the ends of justice. Sec. 25 forbids any trial of a juvenile delinquent and

only an inquiry can be held in accordance with the provisions of the Code of Criminal Procedure for the trial of a summons case and the bar of Sec. 24 which has been given an overriding effect as it opens with the non obstante clause likes away the power of the Court to impose a sentence of imprisonment unless the case falls under the proviso.

Unfortunately, in this case, appellant Gopinath Ghosh never questioned the jurisdiction of the Sessions Court which tried him for the offence of murder. Even the appellant had given his age as 20 years when questioned by the learned Additional Sessions Judge. Neither the appellant nor his learned counsel appearing before the learned Additional Sessions Judge as well as at the hearing of his appeal in the High Court ever questioned the jurisdiction of the trial court to hold the trial of the appellant, nor was it ever contended that he was a juvenile delinquent within the meaning of the Act and therefore, the Court had no jurisdiction to try him, as well as the Court had no jurisdiction to sentence him to suffer imprisonment for life. It was for the first time that this contention was raised before this Court. However, in view of the underlying intendment and beneficial provisions of the Act read with cl. (f) of Art. 39 of the Constitution which provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment, we consider it proper not to allow a technical contention that this contention is being raised in this Court for the first time to thwart the benefit of the provisions being extended to the appellant, if he was otherwise entitled to it.

The report of the learned Additional Sessions Judge is self-evident. It is unquestionably established on unassailable evidence that on August 19, 1974, the date of the offence, appellant was aged between 16 and 17 years. He was therefore, a juvenile delinquent, Obviously, the learned Magistrate could not have committed his case to the Court of Session. Only an inquiry could have been held against him as provided in Sec. 25 of the Act and unless the case of the appellant falls within the proviso to Sec. 24 (2), he could not be sentenced to suffer imprisonment. Therefore, the entire trial of the appellant is without jurisdiction and is vitiated. Therefore, the conviction of the appellant for having committed an offence under Sec. 302 IPC and sentence for imprisonment for life imposed by the learned Additional Sessions Judge and confirmed by the High Court are unsustainable and they must be set aside.

The next question is what should be the sequel to our decision ? The appellant has been in prison for some years. But neither his antecedents nor the background of his family are before us. It is difficult for us to gauge how the juvenile court would have dealt with him. Therefore, we direct that the appellant be released on bail forthwith by the learned Additional Sessions Judge, Nadia. The case is remitted to the learned Magistrate for proceeding further in accordance with law keeping in view the provisions of the Act.

Before we part with this judgment, we must take notice of a developing situation in recent months in this Court that the contention about age of a convict and claiming the benefit of the relevant provisions of the Act dealing with juvenile delinquents prevalent in various States is raised for the first time in this Court and this Court is required to start the inquiry afresh. Ordinarily this Court would be reluctant to entertain a contention based on factual averments raised for the first time

before it. However, the Court is equally reluctant to ignore, overlook or nullify the beneficial provisions of a very socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in this Court. A way has therefore, to be found from this situation not conducive to speedy disposal of cases and yet giving effect to the letter and the spirit of such socially beneficial legislation. We are of the opinion that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special acts dealing with juvenile delinquent are in force. If necessary, the Magistrate may refer the accused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining credit worthy evidence about age. The Magistrate may as well call upon accused also to lead evidence about his age. Thereafter, the learned Magistrate may proceed in accordance with law. This procedure, if properly followed, would avoid a journey upto the Apex Court and the return journey to the grass-root court. If necessary and found expedient, the High Court may on its administrative side issue necessary instructions to cope with the situation herein indicated.

The appeal for the reasons herein indicated is allowed and the conviction of the appellant for an offence under Sec. 302 IPC and sentence imprisonment for life imposed by the learned Additional Sessions Judge and confirmed by the High Court are set aside and the case is remitted to learned Magistrate for disposal according to law.

S.R. Appeal allowed.