

(2011) 10 KL CK 0038

In the High Court Of Kerala

Case No : Criminal M.C. No"s. 1481 and 2715 of 2011

Abdul Aziz

APPELLANT

Vs

Circle Inspector of Police and others

RESPONDENT

Date of Decision : 14-10-2011

Acts Referred:

Commission for Protection of Child Rights Act, 2005 — Section 2
Criminal Procedure Code, 1973 (CrPC) — Section 193, 207, 209, 323
Penal Code, 1860 (IPC) — Section 279, 304, 323, 324, 354

Citation : (2012) 1 ILR (Ker) 74

Hon'ble Judges : N.K. Balakrishnan, J

Bench : Single Bench

Advocate : E.D. George, Sri V. John Sebastian Ralph, Smt. Preethy Karunakaran and Sri K.J. Joseph, for the Appellant; T.R. Renjith (Public Prosecutor), for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice N.K. Balakrishnan

1. An important question arises in these two cases. Since common question is involved, both these cases are heard and disposed of together.

2. The petitioner in Criminal M.C. 2715/2011 is an accused against whom the allegation made is that on 4-2-2005 at 6.30 p.m., he rode the motor cycle bearing No. KL7-AG 5750 on a public road in a rash and negligent manner so as to endanger human life and hit a child aged 3 years. The child later succumbed to those injuries. Hence, the charge-sheet was laid against the accused alleging offences punishable under Sections 279 and 304A IPC.

3. The learned Magistrate found that the victim in this case is a child and as such the case is to be tried by the Children"s Court and therefore the case was committed to the Children"s Court (Principal Sessions Court, Ernakulam). The learned counsel for the petitioner submits that the offence alleged against the

petitioner is not to be tried by Children's Court since no violation of child right is involved in this case and as such the order passed by the learned Magistrate is liable to be set aside.

4. The petitioner in Criminal M.C.No.1481/2011, is the accused in C.C. 87/07 of JFCM-III, Punaloor. The offences alleged against the accused are under Sections 452, 323, 324, 354 and 506 (1) IPC. The allegation against the accused is that on 16-5-2007, he entered the house of the second respondent with a sword and inflicted injuries to respondents 2 to 6. After completing investigation, charge-sheet was laid against him alleging offences as mentioned above. It is stated that the case was thereafter committed to the Children's Court constituted u/s 25 of the Act. Out of the five injured persons, one of them is a boy aged 16 years and another injured is a girl aged 14 years. Therefore, those injured persons are to be reckoned as children being aged less than 18 years as on the date of the commission of the offence.

5. Sec. 2(b) of the Commissions for Protection of Child Rights Act, 2005 defines child rights as:

(b) "child rights" includes the children's rights adopted in the United Nations convention on the Rights of the Child on the 20th November, 1989 and ratified by the Government of India on the 11th December, 1992;

The Commissions for Protection of Child Rights Act, 2005, Central Act 4 of 2006 was enacted to provide for the constitution of National Commission and State Commissions for Protection of Child Rights and Children's Courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto. Article 3 of the Convention on the Rights of the Child, 1989 reads:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration.

2. State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her family for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her and, to this end, shall take all appropriate legislative and administrative measures.

3. State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 5 deals with the rights, duties and responsibilities of parents of child etc., which reads:

State parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

The functions of the Commission constituted under the Act are mainly to study and monitor all matters relating to constitutional and legal rights of children, to examine and review the safeguards provided by any law on the protection of child rights. The Act also recommended measures for their effective implementation in the best interest of the children. The Act also says that the policy of the State shall be such that the tender age of the children should not be abused and their rights are not infringed.

6. The Convention on the Rights of Children, 1989 was adopted by General Assembly Resolution 44/25 without vote on 20-11-1989. That Convention recognised that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. It was also considered that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity. Bearing in mind that ideal, the need to extend particular care to the child was stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20-11-1959 and recognised in the Universal Declaration of Human Rights. The International Covenant on Civil and Political Rights (in particular Articles 23 and 24), the International Covenant on Economic, Social and Cultural Rights (in particular in Article 10) and the statutes and relevant instruments of specialized agencies and international organizations were concerned with the welfare of children. It was also noted that the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. The Convention also took note of the fact that in all countries in the world, there are children living in exceptionally difficult conditions and that such children need special consideration. The importance of the traditions and cultural values of the people for the protection and harmonious development of the child was also taken into account.

7. Article 1 of the Convention mentioned above defines a child to mean every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Therefore, though Central Act 4 of 2006 does not specifically define, "child" since Act 4 of 2006 was enacted based on the United Nations Convention mentioned above, it has to be understood that a person below the age of eighteen years is a child for the purpose of Sec. 2(b) of this Act. The object of the Act is to ensure that the child is given such protection

and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, local guardians or other individuals legally responsible for him or her.

8. It was observed by the Apex Court in *Lakshmi Kant Pandey Vs. Union of India (UOI)*, :

It is obvious that in a civilised society the importance of child welfare cannot be overemphasised, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well-being of the nation depends on how its children grow and develop.

It was also held:

Now obviously children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they have to play in the nation-building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process.

The aforesaid decision was followed in *Ajay Goswami Vs. Union of India (UOI) and Others*, . The Convention on the Rights of the Child, which was concluded by the U. N. General Assembly on 20-11-1989 was accepted by India. That Convention affirms that children's rights require special protection and it aims, not only to provide such protection but also to ensure the continuous improvement in the situation of children all over the world. Therefore, what can be gathered is that children are given facility 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.

9. It is argued by the learned counsel for the petitioner in *CrI. M.C. 2715/11* that in this case the question of abuse of child rights or denial of the protection ensured by the International Convention or the principles proclaimed in the Charter of United Nations does not arise at all. The main objective of the Act is to ensure protection of the rights of the children, like free and compulsory primary education to all children, prohibition of trafficking, forced labour of children and prohibition of employment of children below the age of 14 years in factories, mines or hazardous occupations etc. It cannot be said that a motor vehicle accident has anything to do with the objects sought to be achieved by the Act. There is no exploitation of the child involved in it. It was not done with the intention or knowledge that the freedom or dignity of the child would be affected or infringed.

10. Sec. 25 of the Act which deals with Children's Courts reads:

For the purpose of providing speedy trial of offences against children or of violation of child rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify at least a court in the State or specify, for each district, a Court of Session to be a Children's Court to try the said offences:

Provided that nothing in this section shall apply if-

(a) a Court of Session is already specified as a special court; or

(b) a special court is already constituted, for such offences under any other law for the time being in force.

No separate offence is created or defined under Central Act 4 of 2006. Only the forum/court is changed; the offence continues to be the same; whether it be under Indian Penal Code or under any other Penal Statute. The Principal Sessions Judges of the State have been designated as Children's Courts as per Sec. 25 of the Act.

11. The learned counsel for the petitioners in Cr. M. C. No. 2715/11 would submit that no "child rights" as defined in Sec. 2(b) of the Act is involved in this case to be tried by the Children's Court constituted under Sec. 25. The fact that the victim happened to be a child aged less than 18 years is no reason to hold that the motor vehicle accident, as a result of which the child sustained injury involved violation of child rights, the learned counsel argued. As has been mentioned earlier, the United Nations Convention on the rights of the child adopted on 20-11-1989 and ratified/accepted by the Government of India on 11-12-1992 has nothing to do with the injury which accidentally the child happened to sustain. The learned counsel submits that in most of the motor vehicle accidents one of the victims may be a boy/girl aged less than 18 years. If an interpretation is given to the effect that because the victim is aged less than 18 years there was violation of child rights and so the case is to be tried by the Children's Court, then it would lead to a preposterous position, it is argued. The learned counsel further submits that what is germane for consideration in a motor vehicle accident which resulted in injuries/death to the victims is whether the vehicle was driven in a rash or negligent manner endangering human life and whether the injuries were sustained or death was caused due to that rash or negligent act. That act cannot be construed as an act done with the intention or knowledge of violating "child rights". What are the "child rights" have already been mentioned by reference to the Convention on the rights of the child, 1989 adopted by General Assembly Resolution No. 44/25.

12. The learned Public Prosecutor would submit that the case mentioned in Cr. M. C. 1481/2011 is a case where the allegation is that the accused voluntarily caused hurt to a child. Hence, it amounts to violation of "child rights" as defined in Sec. 2(b) of the Act and as such, the case may have to be tried by the

Children's Court. There is an intentional act on the part of the offender that he, by doing so is causing infringement of the child's right. If the act is done by the accused with the knowledge that his act is likely to violate or infringe the child right then also the case may have to be tried by the Children's Court. So far as the case involved in CrI. M.C. 2715/2011 is concerned, the victim child happened to sustain injuries, to which he subsequently succumbed, only because of the alleged rash or negligent driving of the vehicle by the accused. It was not an act done to violate or negate the "child right". Hence, I am of the view that this accident case is not one which has to be tried by the Special Court/Children's Court presided over by the Principal Sessions Judge of the District.

13. The next point that may arise for consideration is whether the cases involving violation of children's right can be directly filed before the Principal Session Court, the Court constituted u/s 25 of the Act. Section 25 makes it clear that the children's court shall be a court of Session. The Act does not prescribe any special procedure to enable the Children's court to take cognizance of the offences directly. The Children's court should be a court of Session. Hence in view of the inhibition contained in Section 193 of the Code, the Court of Session cannot take cognizance of any offence as a Court of Original Jurisdiction unless the case has been committed to it by a Magistrate under the Code. A similar position was dealt with by the Apex Court while considering the question whether the special court specified under SC/ST (PA Act) can take cognizance of any offence without the case being committed to that court. It was held in *Gangula Ashok and Another Vs. State of A.P.*, :

Thus the Court of session is specified to conduct a trial and no other Court can conduct the trial of offences under the Act. Why the Parliament provided that only a Court of Session can be specified as a Special Court? Evidently the legislature wanted the Special Court to be Court of Session. Hence the particular Court of Session, even after being specified as a Special Court, would continue to be essentially a Court of Session and designation of it as a Special Court would not denude not of its character or even powers as a Court of Session. The trial in such a Court can be conducted only in the manner provided in Chapter XVIII of the Code which contains a fasciculus of provisions for "Trial before a Court of Session".

Section 193 of the Code has to be understood in the aforesaid backdrop. The section imposes against taking cognizance of any offence as Court of original jurisdiction. It can take cognizance only if "the case has been committed to it by a magistrate", as provided in the Code. Two segments have been indicated in Section 193 as exceptions to the aforesaid interdict. One is, when the Code itself has provided differently in express language regarding taking of cognizance, and the second is when any other law has provided differently in express language regarding taking cognizance of offences under such law. The word "expressly" which is employed in Section 193 denoting to those exceptions is indicative of the legislative mandate that a Court of Session can depart from the interdict

contained in the section only if it is provided differently in clear and unambiguous terms. In other words, unless it is positively and specifically provided differently no Court of Session can take cognizance of any offence directly, without the case being committed to it by a magistrate.

Therefore, a case which is to be tried by the Children's Court cannot be filed before the Special Court/Children's Court directly nor can the case be simply transferred by the learned Magistrate to the Children's Court. The learned Magistrate has to follow the procedure for committal of a Sessions case under Sections 207 to 209. If it is a case where the Magistrate finds that the case is to be committed after the commencement of the enquiry/trial then the Magistrate has to follow the procedure prescribed u/s 323 Cr. P. C.

14. Unlike the case mentioned in Cr. M.C. No. 2715/2011, in Cr. M. C. No. 1481/2011 it is a case where the allegation against the accused is that he, at about 8.30 p.m., trespassed into the house of the de facto complainant where two children were also there, and attacked the inmates including the two children aged 14 and 16 years. Therefore, it is a case where violation of "child right" is involved. In other words, the act of the offender can certainly be termed as infringement of child right and as such the offences are to be tried by the Children's Court. Arguments were addressed by the learned counsel for the petitioner/accused touching upon the merit of the case. It is not necessary to dwell on those aspects now.

15. In the light of what is stated above it is held:

Even if the victim in an accident case is aged below 18 years, such cases registered under Sections 279, 337, 338 or 304(A) of I.P.C., being cases arising out of an accident need not be tried by the Children's Court, constituted u/s 25 of the Central Act 4/2006. But, other cases involving violation of "child rights", acts done with the intention to violate or infringe the "child rights" or done with the knowledge that by his act the child right is likely to be violated then such offences are to be tried by the Children's Court. The learned Magistrates, before whom such charge-sheets are filed, are to apply their minds and find whether offences complained of involve violation of the "child rights". If so, such cases are to be committed to the Court of Session (The Children's Court), following the procedure prescribed under Sections 207 to 209 Cr. P. C.

In the result Crl. M. C. No. 1481/2011 is dismissed. But it is made clear that if there was no proper committal of the case under Sec. 209 Cr. P. C. involved in Cr. M. C. 1481/2011 then the learned Sessions Judge will send back the case to the learned Magistrate to follow the procedure and to commit the case in accordance with law.

Criminal M.C. No. 2715/2011 is allowed. The learned Principal Sessions Judge, Ernakulam shall retransmit the case record in S.C. No. 490/2010 to J.F.C.M., North Paravoor. On receipt of the records, the learned Magistrate will try and dispose of the case in accordance with law.