

(2006) 01 CAL CK 0014
In the Calcutta High Court
Case No : C.R.R. No. 2569 of 2003

Jaganmoy Banerjee and Others

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 16-01-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 176, 195(1), 482
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 68
Juvenile Justice Act, 1986 — Section 41, 45
Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960 —
Section 1(3), 13, 24, 25, 68
Penal Code, 1860 (IPC) — Section 120B, 172, 173, 174, 175
West Bengal Juvenile Justice (Care and Protection of Children) Rules, 2003 — Rule 2,
25(3), 27, 30(1), 61(2)

Citation : (2006) 2 CALLT 44 : (2006) 2 CHN 68

Hon'ble Judges : Arun Kumar Bhattacharya, J

Bench : Single Bench

Advocate : Sekhar Basu and Tapas Kumar Ghosh, for the Appellant; Ashim Kumar Roy and Rupa Bandyopadhyay, for the Respondent

Final Decision : Allowed

Judgement

Arun Kumar Bhattacharya, J.—The hearing stems from an application u/s 482 Cr.PC filed by the petitioners praying for quashing the proceeding being G.R. Case No. 599/2003 arising out of Suri P. S. Case No. 193/2003 dated 24.11.2003 under Sections 176/346/317/120B IPC read with Sections 41/45 of the Juvenile Justice Act, 1986, pending in the Court of Id. Sub-Divisional Judicial Magistrate, Suri, Birbhum.

2. The circumstances leading to the above application are that petitioner No. 1 is a Senior Medical Officer of Suri Sadar Hospital, while petitioner Nos. 2, 3 & 4 are President, Secretary and Treasurer respectively of a registered Non-Government Organization in the name of Aurobinda Anusilan Society which runs a Short Stay Home and Creche apart from its involvement in various welfare and voluntary

social services. One Chanchal Kazi and Smt. Dipali Kazi approached petitioner No. 1 at his residence for abortion of Smt. Kazi as she was in her family way before marriage, and despite his initial refusal to abort as it exceeded the purview of M.T.P. law, the said Smt. Kazi ultimately gave birth to a male child in his emergency chamber in the name of Matrimongal Kendra on 04.06.2003. Though petitioner No. 1 pursued the couple, they abandoned the child on condition to take it back if it is approved by their family. On the request of petitioner No. 1, the said Society arranged for rearing up the child in the Short Stay Home. As per intention of District Magistrate, Birbhum, petitioner No. 3 unsuccessfully requested by a letter dated 08.11.2003 to Smt. Ipsita Dey of Ananda Ashram, Beharampore, Murshidabad for taking charge of the child. Pursuant to an advertisement published by the Central Adoption Resource Agency, Ministry of Social Justice and Empowerment, Government of India, the said Society made an application for affiliation or registration for adoption of orphan or uncared for children. On 24.11.2003 at about 8.00 p.m. the District Social Welfare Officer lodged a complaint being registered as Suri P.S. Case No. 193/2003 dated 24.11.2003 under Sections 176/346/317/120B IPC read with Sections 41/45 of the Juvenile Justice Act, 1986 (G.R. Case No. 599/2003) against seven accused persons including the four petitioners, parents of the child and Dr. Ranajit Kumar Bag, Vice-President of the Society alleging that during his visit of the Society on 14.11.2003 he found a male child which should have been brought to the notice of Child Welfare Committee through local P.S. or directly within 48 hours. Despite his request to the Society through a letter dated 14.11.2003 to place the baby before the Child Welfare Committee, Ananda Ashram Home for boys, Beharampore, Murshidabad it was not complied with, for which the child was recovered on the strength of a search warrant on that date and sent to the Child Welfare Committee. On the basis of an order of District Magistrate, Birbhum, on holding an enquiry on 21.11.2003 it was revealed that the N.G.O. was not registered as an Adoption Agency under the Central Adoption Resource Agency or licensed by the State Government under the Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960 or any other Act or rules.

3. Mr. Basu, Id. Senior Counsel for the petitioners, advanced argument contending that the Juvenile Justice Act, 1986 was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 which came into force with effect from 01.04.2001, but there is no corresponding provision of Section 41 and/or Section 45 of the said Act of 1986 in the new Act. So far as the offence u/s 176 IPC is concerned, Mr. Basu submitted that the said provision has no manner of application in this case as Child Welfare Committee, to which a written report with a photograph of the child under two years of age, as required under Rule 25(3) of the West Bengal Juvenile Justice (Care and Protection of Children) Rules, 2003, is to be sent within 48 hours of admission excluding the journey time, cannot be held to be a public servant within the meaning of Section 21 IPC. That apart, Mr. Basu contended that in view of the specific provision of Clause (a)

(i) of Section 195(1) Cr. PC, investigation in the matter and submission of chargesheet, if any, will be a futile exercise of power as taking cognizance is absolutely barred in the absence of any complaint in writing of the concerned public servant. As regards the offence u/s 346 IPC, Mr. Basu submitted that it does not apply in the present facts and circumstances, as the person is a child aged about five months. Mr. Basu incidentally submitted that in pursuance of an advertisement published in the newspaper "Telegraph" dated 03.03,2003 by the Central Adoption Resource Agency, Ministry of Social Justice & Empowerment, Government of India inviting applications from Social & Child Welfare Agencies for financial assistance for running Sishu Greh for promoting in-country adoption, the Society submitted a project proposal on adoption which was forwarded by the District Magistrate, Birbhum on 01.04.2003 to the Director of Social Welfare, Government of West Bengal for onward transmission to the Ministry of Social Justice & Empowerment. Mr. Basu further submitted that the offence u/s 317 IPC is also inapplicable as it is not a case of abandonment of child by the petitioners, and as such there being no *prima facie* material in respect of any of the offences, the proceeding deserves to be quashed against the petitioners. Mr. Roy, Id. Counsel for the State, on the other hand, while frankly submitted that the offence u/s 317 IPC is not applicable in this case as it does not involve abandonment of the child by the petitioners, he contended that Sub-rule (3) of the said Rule 25 obligates the person or organization to send a written report along with photograph of the child within 48 hours of admission of the child excluding the journey period, and since the petitioners failed to comply with the said mandatory provision, they are liable to be prosecuted u/s 176 Cr. PC. Mr. Roy further contended that as it is a case of wrongful confinement of the child in secret in the Short Stay Home of the Society it is an offence u/s 346 IPC also. It was the further contention of Mr. Roy that non-mention of penal provision will not obliterate an offence nor will it absolve the offender if the fact discloses, commission of such an offence, and in the present case since the Society does not possess any certificate, as required u/s 13 of the Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960, petitioner Nos. 2 to 4 at least are liable to be prosecuted u/s 24 of the said Act.

4. Quashing of proceeding to prevent abuse of the process of the Court or otherwise to secure the ends of justice may be done where: (1) it appears that there is a legal bar against the institution or continuance of criminal proceeding in respect of the offence alleged e.g. absence of requisite sanction, or (2) the allegations in the FIR or the complaint even if they are taken at their face value and accepted in their entirety do not constitute the offence alleged, or (3) the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In this connection, reference may be made to the case of *R.P. Kapur Vs. The State of Punjab*, and *State of Haryana and others Vs. Ch. Bhajan Lal and others*, . It is to be borne in mind that the power to quash an FIR by this Court can be exercised very

sparingly and with circumspection and that too in the rarest of the rare cases. At this stage the Court cannot inquire about reliability or genuineness or otherwise of the allegations made in the FIR nor it can inquire whether the allegations are likely to be established or not, as was held in the case of *M. Narayandas v. State of Karnataka* reported in 2004 SCC (Cri) 118 .

5. Undisputedly, the provision of Section 317 IPC is not applicable to the present petitioners. So far as the offence u/s 176 IPC is concerned, with all my concurrence to the above contention of Mr. Basu, I may plough a lonely furrow.

6. By virtue of the power conferred by Section 68 of the Juvenile Justice (Care and Protection of Children) Act, 2000, the West Bengal Juvenile Justice (Care and Protection of Children) Rules, 2003 were made, coming into force with effect from 29.01.03. Sub-rule (3) of Rule 25 of the said rules obligates the person or organization to send a written report along with photograph of the child under two years of age within 48 hours of admission excluding the journey time to the Child Welfare Committee.

7. Intentional omission to give notice or information to public servant by person legally bound to give it is an offence u/s 176 IPC. An omission postulates legal obligation, for there can be no omission when there is no legal obligation. Here, the said Child Welfare Committee cannot be held to be a public servant, and as such there was no legal obligation on the part of the petitioners to give the information. Furthermore, the expression "intentionally omits to give" as used in Section 176 denotes that *metis rea* is essential to constitute an offence. In the present case, the baby was born on 04.06.2003 and on that very date petitioner No. 1 requested through a letter to the Superintendent of Suri Sadar Hospital for arranging for rearing up the child till an alternative arrangement is made. By letter dated 08.11.2003 addressed to Ananda Ashram, Beharampore, Murshidabad, petitioner No. 3, as per instruction of the present O. P. No. 2, proposed to send the child there with a request for early decision in the matter. So the above two letters do not appear to disclose any *metis rea* on behalf of the petitioners. Moreover, Section 195(1) Cr. PC prohibits the Court to take cognizance of any offence punishable under Sections 172 to 188 IPC as specified in clause (a)(i), except on a complaint in writing of the public servant concerned. Here, no such complaint having been filed by the public servant concerned, there is no scope for application of the provision of Section 176 IPC against the petitioners, and on that ground even if investigation is continued followed by submission of chargesheet, it will be of no aid to the prosecution.

8. As regards the alleged offence u/s 346 IPC, in addition to the four ingredients of Section 342 IPC viz. (i) the accused obstructed the person, (ii) such obstruction was voluntary, (iii) the effect of such obstruction was to restrain the person from proceeding beyond a certain limit and (iv) the restraint was wrongful, another additional essential element is that the confinement or the place of the confinement was secret against (a) any person interested in the captive or (b) a public servant. Here, the biological parents abandoned the child

soon after the birth on condition to take it back if it is approved by their family. As the person allegedly confined is a baby, none of the above four ingredients of Section 342 is applicable. Relating to the said fifth ingredient, on the very date of birth of the child on 04.06.2003 petitioner No. 1 requested Superintendent of Suri Hospital in writing to make arrangement for rearing up the child until an alternative arrangement is made. On 04.11.2003 District Magistrate, Birbhum issued a letter to petitioner No. 3 intimating that it was reported that a child was in his custody, and directing him to place the child before Ananda Ashram, Beharampore, Murshidabad followed by proposal of the said petitioner No. 3 through letter dated 08.11.2003 to Ananda Ashram for sending the child there, as instructed by the de facto complainant, and for early decision in the matter. According to the FIR on 04.11.2003 during visit of the de facto complainant of the Short Stay Home of the Society, he found the said child. The above materials do not prima facie appear to disclose the fifth ingredient also since had there been any motive to keep the child in custody secretly, petitioner No. 1 would not have requested the Superintendent of Suri Hospital for rearing up the child, nor there was any scope for the de facto complainant to see the child during his visit of the Short Stay Home on 04.11.2003. Therefore, prima facie materials for the alleged offence u/s 346 IPC also are absent.

9. Section 13 of the Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960 prohibits any person to maintain or conduct any home except under, and in accordance with, the conditions of a certificate of recognition granted under the Act, while Section 24 provides for penalty in case of non-compliance of any of the provision of the Act or of any rule, regulation etc. Sub-section (3) of Section 1 speaks of coming into force of the Act in a State on such date as the State Government may, by notification in the Official Gazette, appoint. Mr. Roy failed to show when the said Act came into force in the State of West Bengal. Moreover, Section 25 in mandatory terms prohibits institution of any prosecution under the Act except with the previous sanction of the District Magistrate or the Chief Presidency Magistrate, as the case may be. No such sanction of the authority concerned has been produced in this case.

10. Furthermore, "Institution" within the definition of Clause (e) of Rule 2 of the West Bengal Juvenile Justice (Care and Protection of Children) Rules, 2003 means an observation home or a special home or a children's home or a shelter home which is set up, certified and recognized under Sections 8, 9, 34 and 37 respectively of the Juvenile Justice (Care and Protection of Children) Act, 2000. Sections 8 & 9 of the said Act deal with observation homes and special homes respectively for temporary reception of juvenile in conflict with law, while Section 34(1) speaks of establishment and maintenance of children's home by State Government either by itself or in association with the voluntary organizations for reception of child in need of care and protection. Sub-section (2) of the said Section 34 inter alia provides for the manner in which the certification of a children's home or recognition to a voluntary organization may be granted or withdrawn. Section 37(1) provides for recognition by the State Government

reputed and capable voluntary organizations and assistance to them to set up and administer as many shelter homes for juveniles or children as may be required. Rule 27 of the said rules provides for authorization by the State Government to well-known voluntary organizations to set up homes for children in need of care and protection, while Rule 30(1) speaks of support by the State Government in creation of the requisite number of shelter homes for such children through voluntary organizations. Sub-rule (2) of Rule 61 in mandatory terms requires all pending cases which have not received a finality to be dealt with and disposed of in terms of the provisions of the Act and the rules made thereunder. So on the face of the above provision and when there are specific and exhaustive rules of the State Government on the subject, the question of attracting the provisions of Orphanages and Other Charitable Homes (Supervision and Control) Act does not arise.

11. Section 41 of the Juvenile Justice Act, 1986, since repealed, has no manner of application in this case. Nevertheless, there is no corresponding provision of the said Section 41 or Section 45 of the repealed Act in the new Act or rules framed thereunder. The new Act or the said rules do not provide for any punishment for violation of any provision. So, there is no scope for attracting the penal provision of Section 24 of the Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960 in the present case.

12. In the light of above discussion, the present application be allowed.

13. The proceeding being G.R. Case No. 599/2003 arising out of Suri P.S. Case No. 193/2003 dated 24.11.2003 under Sections 176/346/317/120B read with Sections 41/45 of the Juvenile Justice Act, 1986 pending in the Court of Id. SDJM, Suri, Birbhum being not maintainable against the petitioners, be quashed.

14. Let a copy of this order be sent down at once to the Id. Court below.

15. Urgent xerox certified copy of this order, if applied for, be supplied to the parties by this week.