

(1991) 11 AP CK 0035

In the Andhra Pradesh High Court

Case No : Writ Petition No. 4156 of 1991

Komalla Krishnaiah presently in Central Jail, rep. by his
Mother Santamma

APPELLANT

Vs

State of A.P. and Another

RESPONDENT

Date of Decision : 08-11-1991

Acts Referred:

Andhra Pradesh Borstal Schools Act, 1925 — Section 10A, 8
Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 302

Citation : (1991) 3 ALT 526

Hon'ble Judges : M.N. Rao, J

Bench : Single Bench

Advocate : K. Ramakrishna Reddy, for the Appellant; Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

M.N. Rao, J.—This is the second round of litigation for the petitioner-herein in order to secure an order for committal to Borstal School. The petitioner was born on 2-6-1969. He was convicted in Sessions Case No. 129 of 1988 for an offence u/s 302 of the Indian Penal Code and sentenced to imprisonment for life by the learned Sessions Judge, Nalgonda. The Petitioner and his brother-in-law were the accused in the criminal case, Criminal Appeal No. 399 of 1989 filed against S.C.No. 129 of 1988 was disposed of by a Division Bench of this Court by a judgment dated 20-9-1989, dismissing the appeal of the petitioner-herein and modifying the sentence of A.1, brother-in-law of the petitioner. While dismissing the appeal of the petitioner herein, the Division Bench recommended that the State Government may pass appropriate orders u/s 10-A of the Andhra Pradesh Borstal Schools Act, 1925 (herein after referred to as "the Act"). In purported compliance with the above direction, the State Government passed an order in Memo No. 155/Prisons/B/90-1, dated 8-2-1990 refusing to commit the petitioner for detention in Borstal School, the relevant portion of which reads as follows:

"Sub:- A.P. Borstal Schools Act, 1925 - Central Prison, Hyderabad - Convict No. 3136 K. Krishnaiah Transfer to Borstal School u/s 10-A of the Act - Regarding.

Ref:- From the I.G. Prisons & DCS Lr.No. 827/SB2/89, dt. 15-1-1990. With reference to his letter cited, the I.G. of Prisons and Director of Correctional Services is informed that his proposal for not transferring Convict No. 3136 K. Krishnaiah of the Central Prison, Hyderabad to Borstal School u/s 10-A of A.P. Borstal School Act, 1925 is accepted. The convict may, therefore, be retained in the Central Prison, Hyderabad"

2. Challenging the legality of the above order, Writ Petition No. 8038 of 1990 was filed on behalf of the petitioner by his mother in this Court. That writ petition was allowed by me on 3-9-1990 with the following directions:

"For the foregoing reasons, the writ petition is allowed. The impugned order issued by the State in Memo No. 15 5/Prisons/90-1, dated 8-2-90 and Lr.No. 827/ SB2/89, dated 15-1-1990 issued by the I.G. of Prisons are set aside and consequently the first respondent is directed to pass a fresh order u/s 10-A of the Act taking into consideration the report submitted by the District Probation Officer, Nalgonda in his letter No. D/NKG/3/89, dated 11-10-1989 as expeditiously as possible, in any event not later than eight weeks from the date of receipt of a copy of this order. It is needless to mention that Krishnaiah shall not be detained in Borstal School beyond the date on which he attains the age of 23 years."

3. Subsequently, the Government have passed the impugned order in G.O.Rt.No. 3220, Home (Prisons-B), Department, dated 12-12-1990, the operative portion of which reads as follows:

"In the light of the judgment dt.3-9-1990 of the High Court of Andhra Pradesh in W.P.No. 8039/1990, Government have again carefully examined the issue and consider that there was no provocation for the convict to involve in the case while two brothers are quarrelling Sri Komalla Krishnaiah had dealt the first blow which is a clear indication of the bad temper of the convict and he is not to be a fit subject for being dealt with u/s 10-A of the Act. They do not see any satisfactory reason to transfer the above said convict to Borstal School u/s 10-A of the Borstal Schools Act, 1925 and accordingly order that he be retained in Central Prison, Hyderabad."

4. Sri K. Ramakrishna Reddi, learned counsel for the petitioner contends that the legal infirmity pointed out by this Court in the earlier writ petition has once again been repeated by the Government while passing the impugned order. The report of the District Probation Officer which is in favour of the petitioner and which, in no unmistakable terms discloses that the petitioner does not suffer from any criminal tendencies, has been eschewed from consideration by the Government while passing the impugned order. At any rate, no reasons are given in the impugned order as to why the recommendation of the District Probation Officer as to the good conduct and lack of criminal tendencies of the petitioner was

rejected.

5. In opposition to this, the learned Government Pleader for Home contends that the act committed by the petitioner itself indicates that he does not deserve to be transferred to the Borstal School from the Central Prison, Hyderabad, where at present he is lodged. The object of committing a prisoner to a Borstal School is to reform him so that he might come out of the prison a reformed man; in other words, the detention in the Borstal School should be to the advantage of the prisoner. But, in this case, the petitioner would be completing 23 years in another six months and twenty six days and, therefore, no useful purpose would be served by passing an order to commit him to Borstal School. Further, u/s 8 of the Act, the minimum period during which a convict-prisoner should be kept in a Borstal School is two years and, therefore, the petitioner is not entitled to the relief he is seeking in this writ petition.

6. The impugned order was struck down by me earlier for the following reasons:

"Although no guide-lines are mentioned under Section. 10-A for the exercise of discretion by the Government for transfer of adolescent offenders from regular prisons to the Borstal Schools, the legislative intendment is fairly discernible; whatever guidelines are set out in Section 8 for the exercise of power by the Courts apply to the Government also u/s 10-A. If there are any other relevant circumstances it is always open to take them into account while passing the impugned orders u/s 10-A of the Act. In the present case, the District Probation Officer had recommended for committal of Krishnaiah in a Borstal School. His enquiries, according to the report submitted by him, disclosed that Krishnaiah's past record was not bad; he was not an habitual offender. The people of the village spoke well of him and the family. It is true that he committed a grave crime for which he was sentenced by the Sessions Court; but if the commission of the crime itself is a factor for declining to exercise power u/s 10-A, there can be no case in which the Government can commit an offender to the Borstal School, The Division Bench of this Court had already recommended the case of Krishnaiah for consideration u/s 10-A. The District Probation Officer in his report had clearly stated that Krishnaiah is a fit person to be committed to Borstal School. The most relevant factor that ought to have weighed with the Government while exercising power u/s 10-A was the report of the District Probation Officer. Failure to consider that report while exercising power u/s 10-A of the Act is a vitiating factor rendering the impugned order illegal.

Apart from this, one other aspect that needs to be noticed is that (he Government merely accepted the letter written by the Inspector General of Prisons and Director of Correctional Services without even verifying the basis for that letter. Section 10-A mandates that the Government themselves must be satisfied about the desirability of transferring an offender to a Borstal School. In exercise of that power the Government may take into account the reports if any submitted by their subordinate officers, but they must consider all the relevant factors. While passing the impugned order, it is clear the Government have

clearly overlooked the existence of a positive report submitted by the District Probation Officer, Nalgonda as regards the suitability of Krishnaiah for committal to Borstal School."

7. A perusal of the impugned order clearly shows that the Government have not taken into consideration the report of the District Probation Officer, Nalgonda dated 11-10-1989 submitted to the Superintendent, Central Prison, Chenchalguda, Hyderabad, which is in the following terms:

"With reference to the above, I have made enquiries about the said convict. His mother along with her daughter is staying in Nalgonda in a rented house. His mother is a daily wage earner and earns Rs. 10/- per day. The neighbours spoke well about the family. I have made enquiries about him in his own village. I have contacted Sri Ram Reddy and Sri Narasaiah, Sri Ramachandra Reddy and Sri Ramulu, who spoke well about him. No one of the village people could speak bad about him.

He is not a naxalite, dacoit nor an habitual offender. He did not have any bad past record in the village. The socio-economical condition of the family is poor.

I have verified the School records and found that his date of birth is 2-6-1969. The date of birth certificate is sent with attestation.

In view of the above facts, I am recommending for his committal to Borstal School and for his early release."

8. The crime committed by the petitioner alone was considered to be the basis for rejecting the request of the petitioner for transfer to the Borstal School. That contention was rejected by me in the earlier writ petition observing that if the commission of the crime itself is a factor for declining to exercise power u/s 10-A, there can be no case in which the Government can commit an offender to the Borstal School. The Division Bench of this Court while disposing of Criminal Appeal No. 399 of 1989 on 20-9-1989 had taken into consideration the nature of the crime committed by the petitioner, his age and felt that "it is a fit case to send him to a Borstal School" and, in that view, recommended to the Government to take action u/s 10-A of the Act. The absence of the report of the District Probation Officer was presumably the reason for the Division Bench in not passing an order straight-away Under Section 8 of the Act for transfer of the petitioner from Central Prison to the Borstal School. It was, therefore, not open to the Government once again to re-emphasise the fact of the gravity of the crime committed by the petitioner for the purpose of rejecting his request for transfer to the Borstal School. The most relevant consideration that ought to have been taken into account while passing the impugned order was the report of the District Probation Officer, which is undoubtedly in favour of the petitioner. The earlier order passed by the Government, was set aside by this Court, on the ground that the Government have not taken into account the report of the District Probation Officer. The same mistake was once again repeated by the Government while passing the present impugned order. It looks as though the

Government are bent upon passing orders of the present nature in order to frustrate the attempts of the petitioner to seek a transfer to Borstal School. Commission of an offence punishable u/s 302 IPC by itself cannot be said to be a ground for not exercising power u/s 10-A of the Act. Vide *Meyappa Chettiar v. Palaniappa Chettiar*, AIR (36) Madras 109; *Public Prosecutor v. Nagappa*, AIR (36) Madras 460 and *In Re: T. Munirathnam Reddi and Another*, .

9. I am inclined to accept the contention of Sri Ramakrishna Reddi that obviously keeping in mind the minimum statutory period of detention as required u/s 8 of the Act, viz., two years, the Government have been repeatedly resorting to passing orders of the present nature. Section 2(1) of Act defines "Adolescent Offender" as meaning any person who has been convicted of any offence punishable with imprisonment or who having been ordered to give security u/s 106 or 108 of the Code of Criminal Procedure has failed to do so and who at the time of such conviction or failure to give security is not less than 16 years nor more than 21 years of age. Section 8 lays down that if it appears to the court having jurisdiction under the Act that detention of an adolescent offender in Borstal School would be conducive to his reformation, it may, in lieu of passing a sentence of imprisonment, pass a sentence of detention in a Borstal School for a term which shall not be less than two years and shall not exceed five years, but in no case the detention shall be beyond the date on which the adolescent offender attains the age of twenty-three years.

10. On the date when the Division Bench judgment was delivered, viz., 20-9-1989, the petitioner had completed 20 years of age. On the date of the commission of the offence, viz., 20-10-1987, the petitioner was aged 19 years. If the Division Bench had called for the report of the District Probation Officer while disposing of the criminal appeal, it would have definitely, in exercise of the power u/s 8 of the Act, committed the petitioner to Borstal School until he completed the age of 23 years. Merely because the Division Bench recommended the case of the petitioner to the Government to exercise of power u/s 10-A of the Act and the inaction on the part of the Government in passing successive orders deliberately not taking into consideration relevant factors which ought to have been taken into consideration, it cannot be said that the time limit imposed by Section 8 constitutes an insurmountable difficulty in the way of the petitioner. Having regard to the particular circumstances of the case, I am inclined to take the view that the computation of the minimum period Of two years as laid down u/s 8 should be reckoned with effect from 20-9-1989, the date when Criminal Appeal No. 399 of 1989 was disposed of by the Division Bench of this Court.

11. No useful purpose would be served by remitting the matter once again to the Government in view of what happened on the previous occasion. When a mandamus was issued by the High Court directing an authority to consider certain relevant factors and to pass an order and if that authority deliberately flouts the mandate of the court and passes an order which is afflicted with the very same legal infirmity, I think it is open to this court to straight-away exercise

the power which is vested in that authority. The decision of the Supreme Court in *Comptroller and Auditor-Gen. of India v. K.S. Jagannathan*, 1986 (2) SCC 682 lends support to the aforesaid proposition. In that decision, the Supreme Court observed:

"There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 4(1) have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 4(1), issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

12. The petitioner would be completing 23 years of age in another six months and twenty-six days. Although this period appears to be too short for his effective reformation, viewed against the prospect of the petitioner remaining in jail for another eleven years and mixing with hardened criminals, I am inclined to take the view that committing him to Borstal School until he completes the age of 23 years would have the desired effect of reforming him. Otherwise, he would end up as a hardened criminal with no prospect of his coming out of prison a reformed man.

13. For these reasons, I would allow the writ petition and set aside the order passed by the Government in G.O.Rt. No. 3220, Home (Prisons B) Department dated 12-12-1990 and direct respondents 1 and 2 herein to transfer the petitioner from the Central Prison, Chenchalguda, Hyderabad to any Borstal School for detention till he completes the age of 23 years and thereafter he shall be set at liberty. The writ petition is allowed accordingly. No costs. Government Pleader's fee Rs. 350/-