

(2004) 12 GUJ CK 0042

In the Gujarat High Court

Case No : Criminal Appeal No. 1089 of 2004 with Criminal Miscellaneous Application No's. 6046 and 9547 of 2004

Nanlabhai Kukabhai Rathwa

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-12-2004

Acts Referred:

Constitution of India, 1950 — Article 39

Criminal Procedure Code, 1973 (CrPC) — Section 223, 223(1), 313, 389

Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 14, 15, 17, 18, 2

Penal Code, 1860 (IPC) — Section 302

Citation : (2005) 25 GLH 611 : (2005) 2 GLR 1388 : (2005) 3 RCR(Criminal) 507

Hon'ble Judges : K.R. Vyas, J; Akshay H. Mehta, J

Bench : Division Bench

Advocate : M.A. Kalathil, for the Appellant; R.C. Kodekar, APP, for the Respondent

Final Decision : Allowed

Judgement

Akshay H. Mehta, J.—The appellant has challenged his conviction u/s 302 of the Indian Penal Code thereafter referred to as "the IPC"] and also the consequential order of sentence directing him to suffer rigorous imprisonment [RI] for life and to pay fine of Rs. 2,000/=, in default to undergo further RI for two months. He has been convicted by the Ld. Addl. Judge & Fast Track Court Judge, Chhota Udepur, in Sessions Case No. 55 of 2003 by judgment dated 17th May, 2004.

2. Facts constituting the present prosecution, in short, can be stated as under :-

2.1. On the date of the incident i.e. 9th March, 2003 the informant and his elder brother Ramsing were going to their uncle's place at about 6.00 p.m. for settling the accounts with regard to wood. They were returning at about 6.45 p.m. At that time the present appellant alongwith one Gumanbhai Kukabhai Rathwa

accosted them in the field of Bhimla Bhuraliya. It is the case of the prosecution that the appellant darted an arrow at the informant and his brother Ramsing. The arrow hit brother of the informant on the left hand side near armpit. Ramsing, therefore, fell down on the ground. It is the case of the prosecution that at that time Gumanbhai was giving filthy abuses and was instigating the appellant to kill the informant and Ramsing. The informant immediately went to the house of his uncle and came back in company of his relatives at the place where Ramsing was lying. When they came there, they found that Ramsing was already dead. They, therefore, went to Rangpur Police Station and lodged complaint against the present appellant. According to the informant, the motive for assault was a land dispute.

2.2. On receipt of the FIR, offence was registered against the appellant and investigation was started. After due investigation, the charge-sheet was submitted in the Court of the Ld. Judicial Magistrate First Class at Chhota Udepur, who in turn committed the case to the Court of Sessions since offence u/s 302 of the IPC is exclusively triable by the Court of Sessions.

2.3. At the trial, the Sessions Court framed charge against the appellant at Exh. 3. The appellant denied his guilt and claimed to be tried.

2.4. At the hearing of the case, prosecution examined 8 witnesses and also produced documentary evidence in support of its case. At the end of the recording of the evidence, the learned trial Judge recorded the further statement of the appellant u/s 313 of the Code of Criminal Procedure [hereinafter referred to as "Cr. P.C."]. It appears that no specific defence was raised except that of general denial.

2.5. As stated above, at the end of the trial the appellant was convicted for offence u/s 302 of the IPC and sentenced to suffer RI for life. The said judgment and order of conviction and sentence are challenged in this appeal.

3. At the time of preliminary hearing of the appeal for admission and hearing of the application filed u/s 389 of the Cr. P.C. by the appellant, it was submitted by Mr. Kalathil, learned advocate appearing for the appellant that the appellant was juvenile at the time when the offence was committed and he ought to have been tried in accordance with the provisions of the Juvenile Justice [Care and Protection of Children] Act, 2000 [hereinafter referred to as "the Act"]. According to him, this fact was never noticed at the time of trial by all concerned and it came to light only after the trial was over and the judgment was pronounced. Having regard to this submission made before us and in view of the decision of the Apex Court rendered in the case of Gopinath Ghosh v. State of West Bengal reported in 1984 S.C.C. 228, we had directed the trial Court vide order dated 20th July, 2004 passed in the present appeal for determining the following issue:-

"What was the age of the accused Nanlabhai Kukabhai Rathwa on the date of offence for which he was tried and convicted?"

While remitting the said issue to the learned trial Court, we had directed it to give opportunity to both the sides to lead oral as well as documentary evidence to enable the trial Court to reach to proper and correct conclusion. We had also given liberty to the trial Court to send the appellant to the Chief Medical Officer, Vadodara for carrying out ossification test.

3.1. Pursuant to the said direction, the trial Court held due inquiry for determining the aforesaid issue. In the process, it permitted the parties to lead evidence. The ossification test of the appellant was also got carried out and Dr. Girishbhai Ambalal Patel was examined before the trial Court on that aspect. Over and above that, one Dr. Vijay Narsinhbhai Vaidya as well as four other witnesses were also examined and several documentary evidence was produced. Considering the overall evidence adduced before it, the trial Court gave a finding by order dated 22nd September, 2004 certifying that the age of the appellant on the date of commission of the offence was less than 18 years. The learned trial Judge has thereafter submitted his report alongwith the record of the inquiry to this Court. We have carefully perused the record and other material. The conclusion given by the trial Court on the issue of the age of the appellant is now not disputed by the prosecution. In that view of the matter, we have now no hesitation in accepting the submission of the appellant that at the time of commission of the offence, he was juvenile within the meaning of provisions of section 2(k) of the Act. The said provision reads as under :-

"(k) "juvenile" or "child" means a person who has not completed eighteenth year of age."

We, therefore, hold that at the time when the offence was committed, the appellant was juvenile.

4. The question now that is required to be decided is what is the effect of the trial that was conducted before the Ld. Addl. Judge and Fast Track Court Judge at Chhota Udepur and the judgment and order of conviction and sentence passed by him. For that purpose it would be necessary to turn our attention to several provisions of the Act. It may be noted here that prior to the Act coming into force, the Juvenile Justice Act of 1986 was effective. The said Act provided that juvenile would mean a boy who had not attained the age of sixteen years or the girl who had not attained the age of eighteen years. However, the said Act now stands repealed with the introduction of the Act by virtue of section 69(1) of the Act. The Act has increased the age of juvenile from 16 years to 18 years. Since the present offence has taken place after the Act come into force, naturally the provisions of the Act would be applicable and the appellant would be tried in accordance with the provisions of the Act only.

4.1. Chapter II of the Act deals with juvenile in conflict with law. The words "juvenile in conflict with law" have been defined in clause (I) of section 2 of the Act. It means a juvenile who is alleged to have committed an offence. Section 4 which forms part of Chapter II confers powers on the State Government to

constitute Juvenile Justice Board for a district or a group of districts by issuing notification in the Official Gazette. Section 5 of the Act provides for procedure, etc. in relation to Board. Section 6 of the Act confers certain powers on the Board. Sub-section (1) thereof confers power to deal exclusively with all proceedings under the Act relating to juvenile in conflict with law. Sub-section (2) of section 6 further provides that the powers conferred on the Board by or under the Act may also be exercised by the High Court and the Court of Sessions, when the proceeding comes before them in appeal, revision or otherwise. Section 14 of the Act provides as under :-

"14. Inquiry by Board regarding juvenile.- Where a juvenile having been charged with the offence is produced before a Board, the Board shall hold the inquiry in accordance with the provisions of this Act and may make such order in relation to the juvenile as it deems fit : Provided that an inquiry under this section shall be completed within a period of four months from the date of its commencement, unless the period is extended by the Board having regard to the circumstances of the case and in special cases after recording the reasons in writing for such extension."

Section 15 empowers the Board to pass appropriate order that may be passed by the Board regarding juvenile. Upon the Board holding the inquiry and satisfying itself that the juvenile had committed an offence. Sections 17 and 18 deal with proceeding of the juvenile. They are as under:-

"17. Proceeding under Chapter VIII of the Code of Criminal Procedure not competent against juvenile.- Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (2 of 1974) no proceeding shall be instituted and no order shall be passed against the juvenile under Chapter VIII of the said Code.

18. No joint proceeding of juvenile and person not a juvenile.- (1) Notwithstanding anything contained in section 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, no juvenile shall be charged with or tried for any offence together with a person who is not a juvenile. (2) If a juvenile is accused of an offence for which u/s 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, such juvenile and any person who is not a juvenile would, but for the prohibition contained in sub-section (1), have been charged and tried together, the Board taking cognizance of that offence shall direct separate trials of the juvenile and the other person."

Section 20 of the Act deals with special provision in respect of pending cases i.e. the cases which were not complete and pending in the Court of law at the time when the Act came into force.

5. Having seen the relevant provisions of the Act, we may also refer to the several decisions which may be useful for the purpose of giving proper judgment. In the case of *Gopinath Ghosh v. State of West Bengal* [supra] the Apex Court

has held with regard to West Bengal Children's Act that it being a beneficial legislation and socially progressive statute read with Article 39(f) of the Constitution, new plea raised for the first time with regard to the age of the accused being below 18 years could be entertained even when the matter was before the Apex Court. In that view of the matter, we were fully justified in directing the trial Court to hold inquiry on the issue of the age of the appellant and to submit its findings to us.

6. Now when the issue with regard to age of the appellant is very clear and it is found that at the time of commission of offence he was juvenile within the meaning of the Act, the question is what effect on the trial that was carried out before the Ld. Addl. Judge and Fast Track Court Judge. It may be noted here that this is a special legislation enacted with a special purpose, namely to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juvenile and for the adjudication of certain matters relating to, and disposition of the delinquent juvenile. As stated above, initially it was the Act of 1986 which was prevalent for that purpose, but later on, upon review of the working of the 1986 Act, it was found that greater attention was required to be given to children in conflict with law and, therefore, the Act was brought on the statute book. Thus, being a special Act it has got overriding effect on the provisions of the common law. Thus, when a juvenile is accused of having committed some offence, he is required to be produced before the Board. As stated above, section 14 of the Act provides for inquiry of the Board as and when juvenile having been charged with an offence is produced before the Board. The inquiry is to be held in accordance with the provisions of the Act. Thus, when a special provision is made with regard to juvenile being tried at the inquiry to be held by the Board, any trial which is held in respect of juvenile in the regular Court of law in accordance with the provisions of the Cr.P.C. would stand vitiated, even when no plea of the accused being a juvenile is raised at the trial. It is an admitted fact that in the present case, at the time of trial of the appellant, the defence had never raised any plea to the effect that the appellant was below the age of 18 years and hence juvenile at the time of commission of the offence and Sessions Court had no authority or power to hold his trial and give verdict. However, at the appellate stage, the said plea has been raised and we have accepted it also. In that view of the matter, in our opinion, the entire trial that was conducted before the Ld. Addl. Judge and Fast Track Court Judge at Chhota Udepur gets vitiated, being without jurisdiction and authority of law. Needless to say that the order of conviction and sentence passed by the said Judge at the conclusion of the trial cannot stand as they also fall alongwith the trial. We, therefore, hold that the judgment and orders of conviction and sentence passed by the Ld. Addl. Judge and Fast Track Court Judge, Chhota Udepur in Sessions Case No. 55 of 2003 dated 17th May, 2004 are illegal and hence quashed and set aside.

7. Having quashed the conviction and sentence, the next question that would arise for us is as to what course to be adopted. It is further directed that the trial

Court shall forthwith make arrangement to get him released from the Central Prison, Vadodara and to produce him before the concerned Board on or before 9th December, 2004 with the accusation of having committed the aforesaid offence to enable the Board to take further action in accordance with the provisions of the Act. The Board may, as and when he is produced before it, pass appropriate order including interim order which it may deem fit in the facts and circumstances of the case.

The result is that this appeal is allowed.

In view of the above, both the Criminal Misc. Applications do not survive and they are disposed of accordingly.