

(2010) 07 J&K CK 0008
In the Jammu And Kashmir High Court
Case No : 561-A Cr.P.C. No. 139 of 2009

Sadiq Khanday and Others

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 29-07-2010

Acts Referred:

Ranbir Penal Code, 1989 — Section 307, 34, 341

Citation : (2010) 4 JKJ 821

Hon'ble Judges : Gh. Hasnain Massodi, J

Bench : Single Bench

Judgement

Gh. Hasnain Massodi, Judge

1. Bashir Ahmad Khanday son of Ali Mohammad Khanday resident of Nasarpora, Khag, on 07.01.2009 lodged a written complaint with Police

Station Khag, alleging therein that on the said date at 4:30 PM, S/Shri Sadiq Khanday, Farooq Ahmad Khanday, Mushtaq Ahmad Khanday,

Reyaz Ahmad Khanday - petitioners herein and Mst. Mugli and Mst.Fata alias Naza, caught hold of his daughter -Kulsuma Bano, near local

mosque and subjected her to beating; that Kulsuma Bano was so severely thrashed that the complainant lost hope of her life. The report prompted

P/S Khag to register FIR No.01 of 2009 u/s 307, 341, 34 RPC. The victim succumbed to injuries and offence u/s 307 was changed to 302 RPC.

After usual investigation the case was closed as proved against the petitioners and charge-sheet, alleging commission of offence u/s 302, 341, 34

RPC, presented against the petitioners. The Trial Court upon perusal of the charge sheet and on hearing the public prosecutor and defence counsel

as also petitioners held that the material prima facie disclosed commission of offence punishable u/s 302, 341, 34 RPC, by the petitioners. The

petitioners were, accordingly, charged of said offences. The petitioners denied the charge and asked for early trial.

2. Before the trial would commence and the prosecution asked to adduce evidence in support of the charge, the petitioners filed instant petition u/s 561-A Cr.P.C, seeking quashment of the charge.

3. The case set up by the petitioners is that having regard to the age of victim, the weapon of offence, part of body of the victim, where blows were allegedly given and the injuries found on the person of victim, a case u/s 302 RPC was not made out and the Trial Court thus erroneously charged

the accused - petitioners with the offence punishable u/s 302 RPC. The order dated 28th of August 2009 is assailed as one amounting to abuse of

process of court. It is pleaded that in order to prevent miscarriage of justice, the Court in exercise of its inherent jurisdiction, must quash order in

question and ask Trial Court to charge the petitioners of the offence(s) made out on objective perusal of the charge sheet and material appended

thereto. Order dated 28th August 2009. according the petitioners, denies benefit available under J&K Juvenile Justice Act 1997 to the petitioner -

Mushtaq Ahmad Khanday and on that count also the order is assailed as amounting to abuse of process of the court, warranting interference u/s

561-A Cr.P.C.

4. Heard and considered.

5. It is well settled law that the inherent powers available to the Court u/s 561-A Code of Criminal Procedure are to be exercised only to prevent

abuse of process of the Court, secure the ends of justice or to give effect to an order under the Code. No doubt, the inherent powers, vested in

this Court, are an inalienable attribute of the position this Court holds with respect to the courts subordinate to this Court, yet the powers are to be

exercised rarely, sparingly and with utmost circumspection. It would be apt to extract hereunder, observations made by the Supreme Court in case

Som Mittal Vs. Govt. of Karnataka, : -

10. In a catena of decisions this Court has deprecated the interference by the High Court in exercise of its inherent powers u/s 482. It has been

consistently held that the power u/s 482 must be exercised sparingly, with circumspection and in rarest of rare cases. Exercise of inherent power

u/s 482 of the Code of Criminal Procedure is not the rule but it is an exception.

The exception is applied only when it is brought to the notice of the Court that grave miscarriage of justice would be committed if the trial is allowed to proceed where the accused would be harassed unnecessarily if the trial is allowed to linger when prima facie it appears to Court that the trial would likely to be ended in acquittal. In other words, the inherent power of the Court u/s 482 of the Code of Criminal Procedure can be invoked by the High Court either to prevent abuse of process of any Court or otherwise to secure the ends of justice.

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19. We may observe that despite this Court consistently held in catena of decisions that inherent power of the High Court should not be exercised according to whims and caprice and it has to be exercised sparingly, with circumspection and in the rarest of rare cases, we often come across the High Court exercising the inherent power u/s 482 of the Code of Criminal Procedure in a routine manner at its whims and caprice setting at naught the cognizance taken and the FIR lodged at the threshold committing grave miscarriage of justice. While it is true that so long as the inherent power of Section 482 is in the Statute Book, exercise of such power is not impermissible but it must be noted that such power has to be exercised sparingly with circumspection and in the rarest of rare cases, the sole aim of which is to secure the ends of justice. The power u/s 482 is not intended to scuttle justice at the threshold.

6. In the present petition, the main ground urged to seek quashment of order dated 28th of August 2009, is that having regard to the facts and circumstances, discernible from the record, offence lesser than one punishable u/s 302 RPC was made out and the learned Trial Court ought not to have charged the petitioners of offence alleged in charge sheet. It is insisted that having regard to the nature of injuries found on the body of the deceased and the medical opinion, the injuries are not sufficient in ordinary course of nature to cause death. Support is sought from law laid down in Rambaran Mahton Vs. The State, ; Shangara Singh and another v. State of Punjab, (1973-77) Suppl. C.L.R.; Dhariwal Tobacco Products Limited and others v. State of Maharashtra and others, (2009) 1 SCC (Cri) 806; and Kalyan Chandra Sarkar v. Rajesh Ranjan, AIR (2005) SCW 536.

7. Learned Trial Judge upon consideration of record of the case and the documents submitted with the charge sheet and after hearing the petitioners - accused, their counsel as also public prosecutor, has opined that there is ground for presuming that the petitioners have committed offence punishable u/s 302, 341, 34 RPC and formally charged the petitioners of the aforesaid offence. The order in question is a threshold order, passed on prima facie view of the case and to push the trial to the take-off stage. The court at the time of framing of charge is not to see as to whether there is sufficient ground for conviction of accused or whether the trial is sure to end in his conviction. A strong suspicion at the initial stage may be sufficient for the court to presume that the accused has committed the offence alleged in charge sheet. The court at the initial stage has not to go for an in-depth and elaborate discussion of the material and assess its chances of being accepted at the touchstone of legal principles that are to be taken into consideration at the end of the trial. The grounds urged in the petition are meant for the trial and may very well be urged at the conclusion of the trial after the petitioners defend their case in light of projected gaps, loopholes, and infirmities in the prosecution case. So viewed the order in question neither amounts to abuse of process of court nor is exercise of inherent powers called for to secure ends of justice, or prevent miscarriage of justice. The case law relied upon by the learned counsel for the petitioners, relates to stage when the evidence was recorded by the Trial Court and appreciated on the anvil of principles governing its appreciation. No interference is thus warranted as regards framing of charge against the petitioners and other accused. However, this does not clinch the matter.

8. It appears that the Investigating Officer during the course of investigation, found petitioner/ accused No.3, juvenile within meaning of J&K

Juvenile Justice Act 1997 (herein after referred to as "Act"). Accordingly, a separate charge sheet was presented against the petitioner/ accused

No. 3. The Investigating Officer appears to have been alive to mandate of the Act and decided to make available benefit under the Act to the

petitioner/ accused No. 3. Learned Trial Judge surprisingly has declared petitioner/accused No. 3 as non-juvenile/adult and decided to try

petitioner/accused No. 3 along with other accused. It would be appropriate to extract the relevant part of the Trial Court order dated 28th of

August 2009:-

One of the accused Mushtaq Ahmad Khanday has been shown to be minor and a separate charge sheet has been filed against him. However,

from the perusal of the file it appears that he is plus 16 years of age and therefore he is not a Juvenile within the meaning of Juvenile Justice Act of

J&K, therefore no separate challan is needed. He can be tried alongwith other accused and shall be accordingly tried henceforth.

9. J&K Juvenile Justice Act 1997 is a piece of welfare legislation, intended to treat delinquent children of tender age differently from adult accused.

It is to be appreciated that criminal liability rests on principle of mens rea or intention. A person is punished for an act or omission recognized by

law as a crime, because such a person is taken to have intended the alleged act or omission. It is well settled law that a person intends what he

does. This principle, however, cannot be applied in case of children. It is in recognition of this principle that Section 82 RPC provides that nothing

is an offence which is done by a child under 07 years age. Juvenile Justice Act goes a step further and mandates that a person under 16 years of

age, accused of an offence, is to be treated differently as against an adult accused.

10. Supreme Court in Umesh Chander v. State of Rajasthan (1982) 3 SCC 592 commenting upon rationale and logic behind a separate Juvenile

Justice Legislation, observed:

Children Act was enacted to protect young children from the consequences of their consequences of their criminal acts on the footing that their

mind at that age could not be said to be mature for imputing mens rea as in the case of adult.

11. In Hari Ram Vs. State of Rajasthan and Another, referring to the background philosophy of Juvenile Justice Legislation and change in the

mindset necessitated by such legislation, held:-

2. The said law which was enacted to deal with offences committed by juveniles, in a manner which was meant to be different from the law

applicable to adults, is yet to be fully appreciated by those who have been entrusted with the responsibility of enforcing the same, possibly on

account of their inability to a system which, while having the trappings of the general criminal law, is, however, different therefrom.

3. The very scheme of the aforesaid Act is rehabilitatory in nature and not adversarial which the courts are generally used to. The implementation of the said law, therefore, requires a complete change in the mindset of those who are vested with the authority of enforcing the same, without which it will be almost impossible to achieve the objects of the Juvenile Justice Act, 2000.

12. It was further observed:-

The need to treat children differently from adults in relation to commission of offences had been under the consideration of the Central Government ever since India achieve independence. With such object in mind, Parliament enacted the Juvenile Justice Act, 1986, in order to achieve the constitutional goals contemplated in Articles 15(3), 39(e) & (f), 45 and 47 of the Constitution imposing on the State a responsibility of ensuring that all the needs of children are met and that their basic human rights are fully protected.

13. The Constitution Bench of Supreme Court in Pratap Singh Vs. State of Jharkhand and Another, , emphasizing role of subordinate courts in making juvenile justice a reality, has laid down:

We expect the High Courts and subordinate courts to deal with such cases with more sensitivity, as otherwise the object of the Acts would be frustrated and the effort of the legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated.

14. In the present case learned Trial Court, oblivious to aims and objects of J&K Juvenile Justice Act 1997, has, in a casual, cursory and slipshod manner, withdrawn benefit available under the Act to the petitioner/ accused No.3 that was extended by the Investigating Officer. Learned Trial

Court appears to have shown least sensitivity, while dealing with the matter and declined prayer of the prosecution to treat petitioner/accused No.3

as juvenile in a cursory and lifeless manner. There can be cases, where Investigating Officer for mala fide reasons, declares an accused a juvenile,

oblivious to the record, so as to oblige the accused. The Trial Court is not powerless to refuse to extend benefit under Act to an accused, who in

its opinion does not deserve it. However, least that is expected of the Trial Court is to give fair opportunity to the accused shown as juvenile by the

prosecution to substantiate that the conclusion drawn by the prosecution are in conformity with law and do not warrant any interference.

15. In *Bhola Bhagat Vs. State of Bihar*, , Supreme Court delineating duty of the Trial Court in a matter, where juvenility of the accused is in

question, has observed:

It becomes obligation for the Court, in case it entertains any doubt about age as claimed by the accused to hold an inquiry. It is for determination of

question of age of the accused or.....an inquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead

evidence in that regard. Keeping in view the beneficial nature of the socially-oriented legislation, it is an obligation of the court where such a plea is

raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the

provisions to an accused. The Court must hold an inquiry and return a finding regarding age, one way or the other.

16. Viewed thus the Trial Court order dated 28th August 2009 to the extent it has rejected the prayer made by the prosecution to treat

petitioner/accused No.3 as juvenile and directed trial of the petitioner/accused No.3 with other accused amounts to abuse of process of the court

and exercise of inherent powers u/s 561-A Cr.P.C. is called for. The order to the said extent is accordingly quashed. The Trial Court is directed to

give a fresh look to the matter, allow the petitioner/accused No.3 and the prosecution a fair opportunity to substantiate that the petitioner/ accused

No.3 was juvenile on the date of occurrence and thereafter return a finding in accordance with law. The Trial court is expected to be alive to the

aims and objects of Juvenile Justice Legislation and in particular law laid down in *Arnit Das Vs. State of Bihar*, and *Rajinder Chandra Vs. State of*

Chhattisgarh and *Another*, .

17. In *Arnit Das's* case (supra), Supreme Court held that while dealing with the question of determination of the age of the accused for the

purposes of finding out whether he is a juvenile or not, a hyper technical approach should not be adopted while appreciating evidence adduced on

behalf of the accused in support of the plea that he was a juvenile on the said date and if two views may be possible on the said evidence, the court

should lean in favour of holding the accused to be a juvenile in borderline cases.

18. In *Rajinder Chandra's* case, benefit under the Act was extended to an accused though two views were possible. In *Hari Ram's* case, Supreme

Court reemphasizing the object of the Act, called for a liberal and purposive interpretation of its provisions, held:

.....Scheme of the Act is to give children, who have, for some reason or the other, gone astray to realize their mistakes, rehabilitate themselves and rebuild their lives and become useful citizens of the Society instead of degenerating into hardening criminals.

19. The Trial Court shall as far as possible conclude inquiry as regards juvenility of accused/petitioner No.3 within 4-6 weeks so that trial in the

main case does not get delayed. Having regard to the fact that the petitioner/accused No.3 is claimed by the prosecution to be a juvenile but held

by the Trial Court to be ""plus 16 years of age"" and that an inquiry has been ordered to obtain a finding on the juvenility of the petitioner/ accused, it

would be in the interests of justice to admit the petitioner/accused to short bail, so that the petitioner/ accused is not exposed to an atmosphere that

may down the line, degenerate the petitioner/ accused into a hardened criminal. Needless to mention that even as per the observations made by the

Trial Court, the petitioner/ accused is ""plus 16 years of age"" and thus of tender and impressionable age. It is pertinent to point out that Juvenile

Justice Act 1986 (Central Act) 1986 has been replaced by Juvenile Justice (Care and Protection of Children) Act, 2000, wherein not only

delinquent juvenile"" is rephrased as ""juvenile in conflict with law"" but detention of juvenile recast including a child below 18 years of age included in

the definition.

20. So viewed the petitioner/ accused No.3 - Musthaq Ahmad Khanday son of Farooq Khanday is admitted to short term bail for a period of six

weeks and directed to be released on his furnishing Surety Bond in the amount of Rs.50,000/- and Personal Bond in the identical amount to the

satisfaction of Registrar Judicial, High court Wing Srinagar. However, the petitioner/ accused No.3 shall remain present before the Trial Court on

each and every date of hearing and desist from tampering with the prosecution evidence, obstructing trial or in any manner abusing the concession

extended to him. Learned Trial Court is expected to have before it, outcome of inquiry as regards juvenility of petitioner/ accused No.3 within 4-6

weeks and the Trial Court shall pass further orders as regards extension in bail in light of results of the inquiry. It is made clear that the Trial Court

shall be free to pass any order warranted under law, including one declining extension in bail in case the petitioner/ accused No.3 is found to be adult.

21. The petition along with all CMP(s) is disposed of accordingly.