
(1989) 01 SHI CK 0006
In the High Court Of Himachal Pradesh

Saroop Kumar

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 13-01-1989

Acts Referred:

Himachal Pradesh Children Act, 1979 — Section 21, 23, 23(1), 5(2)
Penal Code, 1860 (IPC) — Section 302

Citation : (1989) CriLJ 1884 : (1989) 1 ILR HP 14 : (1989) 2 RCR(Criminal) 591

Hon'ble Judges : R.S. Thakur, J

Bench : Single Bench

Judgement

R.S. Thakur, J.—This Criminal Revision Petition has been registered on the application of the revisionist Saroop Kumar, wherein he has stated that he was tried and convicted for an offence u/s 302 of the Penal Code by the Additional Sessions Judge, Kangra at Dharamsala, vide his order dt. Dec. 6, 1983, which order was then set aside, in appeal, by this High Court vide order dt. April, 3, 1985, holding that the commitment order as also the trial of the revisionist by the Additional Sessions Judge in pursuance to the commitment order were without jurisdiction since the revisionist was a child at the relevant time. The revisionist was, thereafter tried for the same offence by the Children's Court at Una which Court after holding him guilty ordered that the revisionist be kept for a period of seven years for the offence u/s 302 of the Penal Code in Special School at Haroli or in any other Special School or Reformatory School or Borstal School or any other institution as the State Government may deem it fit in view of the provisions of Section 23 of the H.P. Children Act, 1979 (hereinafter referred to as the Act). Thereafter the revisionist vide an application dt. Dec. 15, 1987 again approached the Children's Court with the request that he be released on his executing surety bond to the satisfaction of the Court and be entrusted to the care and custody of his parents against adequate security as he had attained the age of majority, that is, 18 years and it was not proper to keep him with the children in the Special School at Haroli and that he had attained the age of 18 years in the year 1986. This application of his was also rejected by the

Children's Court vide its order dt. April, 8, 1988 and hence this revision. The revisionist has urged in the instant revision petition that his case was governed by Section 21 of the Act and not u/s 23 of the Act and, therefore, the order of the Children's Court dt. June 17, 1986 u/s 23 of the Act was improper.

2. Since this petition has been sent through Incharge, Special Children School, Una, where the revisionist remains lodged, this Court appointed Shri Praneet Gupta, Advocate, as pleader, at State expenses to assist this Court on behalf of the revisionist and this Court places on record its appreciation that he has done his job well.

3. From the judgment of the Children's Court dt. June 17, 1986, it is apparent that according to the finding of the Court, the revisionist at the time of the commission of the offence in question was over 14 years of age and the Court has, therefore, ordered his detention in the Special Children School for seven years in accordance with Section 23 of the Act. In fact para 57 of the impugned judgment being relevant in this behalf is reproduced as under : ---

The delinquent has given his age as in between 17 to 18 years. He was held as a "child" on 9-6-1982, the date of commission of the offence. Thus it is clear that the delinquent is a child over the age of 14 years and the provisions of Section 21(1)(c)(i) are only attracted to the present facts and that of Section 23 of the Act. Section 21(1)(c)(i) prescribes that an order directing a child to be sent to a special school can be passed in the case of a boy over 14 years of age for a period of "not less than 3 years. There is no provision which prescribes the maximum period for which a "child" can be sent to such a school. However, Section 23, Sub-clause (2) proviso prescribes that the period of detention so ordered shall not exceed the maximum period of imprisonment to which the child could have been sentenced for the offence committed. It is the only rider to Section 21 of the Act.

4. I have heard the learned Counsel for the parties and also gone through the record of the case and for reasons to be recorded presently, I feel that the revision in hand deserves to be accepted.

5. The learned Counsel for the revisionist has argued that the Children's Court in its impugned order has erred in holding that the case is governed by Section 23 of the Act and that as a matter of fact his case is squarely covered by the provisions of Section 21 thereof. The learned Counsel for the State, on the other hand, has supported the order of the Children's Court and stated that since the proviso to Section 23 of the Act clearly says that the delinquent child be kept for the maximum period of detention to which the child could have been sentenced for the offence committed, the revisionist has rightly been ordered to be kept in the Special School for a period of seven years which was the maximum period of sentence which the Court was competent to award him.

6. In order to properly construe the relevant provisions of these two Sections, they are reproduced as under:

Section 21(1). Where a Children's Court is satisfied on inquiry that a child has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Children's Court may, if it so thinks fit,-

- (a) allow the child to go home after advice or admonition;
- (b) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person executing a bond, with or without surety as that Court may require for the good behaviour and well being of the child for any period not exceeding three years;
- (c) make an order directing the child to be sent to a special school,-
 - (i) in the case of a boy over fourteen years of age or of a girl over sixteen years of age, for a period of not less than three years;
 - (ii) in the case of any other child, for the period until he ceases to be a child:

Then the first proviso to this sub-section provides for reasons to be recorded to reduce the period of stay.

7. The second proviso then empowers the Court for reasons to be recorded to extend the period of such stay, but in no case the period of stay, shall extend beyond the time when the child attains the age of eighteen years in the case of a boy, or twenty years in the case of a girl.

7A. Then Section 23 states:

(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent child shall be sentenced to death or imprisonment, or committed to prison in default of payment of fine or in default of furnishing security provided that where a child who has attained the age of fourteen years has committed an offence and the Children's Court is satisfied that the offence committed is of so serious a nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other children in a special school to send him to such a special school and that none of the other measures provided under this Act is suitable or sufficient, the Children's Court may order that delinquent child to be kept in safe custody in such place and manner as it thinks fit and shall report the case for the orders of the Government.

(2) On receipt of a report from the Children's Court under Sub-section (1), the Government may make such arrangement in respect of the child as it deems proper and may order such delinquent child to be detained at such place and on such conditions as it thinks fit:

Provided that the period of detention so ordered shall not exceed the maximum period of imprisonment to which the child could have been sentenced for the offence committed.

8. The Children's Court in para 58 of the impugned judgment has observed that since the powers of the Presiding Magistrate of the Children's Court have been conferred upon him by virtue of his being posted as Chief Judicial Magistrate, the maximum punishment which could be inflicted upon the revisionist was seven years and that as such while relying upon the second proviso to Section 23, he has ordered seven years' detention of the revisionist in the Special Children School at Haroli.

9. Now the first question that arises for determination is whether the Children's Court was competent to convict the revisionist for a maximum period of imprisonment of seven years and thus his order of detention for that period is competent under the second proviso to Section 23. The answer to this poser is clearly in the negative. Under Clause (d) of Section 2 of the Act, "child" means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years. Then under CL (e) thereof, "Children's Court" means a Court constituted u/s 5.

10. Sub-section (2) of Section 5 of the Act then lays down:

A Children's Court shall consist of such number of judicial magistrates of the first class, forming a bench, as the Government thinks fit to appoint, of whom one shall be designated as the principal magistrate; and every such bench shall have the powers conferred by the Cr. P.C. 1973 (2 of 1974), on a judicial magistrate of the first class.

11. Thus it is patent that the powers of the Children's Court are confined and are equivalent to and co-extensive with the powers of a judicial magistrate of the first class under the Cr. P.C. of 1973.

11A. Section 29 of the Cr. P.C. then states:

(1) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or imprisonment for life or of imprisonment for a term exceeding seven years.

12. Thus the maximum power of sentence that vests in the Chief Judicial Magistrate under the said section is seven years' of imprisonment.

13. Then Sub-section (2) thereof lays down that the Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both. Thus the maximum powers of sentence which are conferred upon the Magistrate of first class under the Code to substantive period of imprisonment is only three years. Obviously from this Sub-section (2) of the Section 29 of the Cr. P.C. read with Sub-section (2) of S. 5 of the Act, it becomes crystal clear that the maximum power of imprisonment that the Children's Court enjoys is only three years. Since in terms of Section 23 of the Act no delinquent child can be sentenced to imprisonment by the Children's Court but in accordance with the proviso thereto, the maximum power of the Court to award sentence of detention to the

delinquent child can in no case exceed the period of three years. In the instant case obviously, the revisionist has been ordered to be detained for a period of seven years which is apparently in utter violation of the provisions of the Act.

14. The learned principal magistrate of the Children's Court in this case has awarded this detention of seven years in that capacity perhaps under the misconception that since he was a Chief Judicial Magistrate having maximum power of imprisonment for seven years, he could legally order the detention of the revisionist for the period co-extensive with his maximum powers which was a complete mis-construction and violation of the provisions of Sub-section (2) of Section 5 of the Act, since even if as Chief Judicial Magistrate he was enjoying the powers for imprisonment for seven years, the moment he presides over the Children's Court, those powers become irrelevant as he becomes only one of the members of the Bench of the Children's Court and as such the maximum power of detention of the Bench will be only for a period of three years irrespective of his own powers as Chief Judicial Magistrate, as the powers of the Children's Court in this behalf are equivalent to those of the powers of the Judicial Magistrate of the first class under the Cr. P.C. which is not more than three years of imprisonment.

15. Now coming to the provisions of Section 21 of the Act, under Clause (c) thereof the Children's Court has been empowered to send a delinquent child to a special school for a period of three years in case of a boy over fourteen years of age and a girl over sixteen years of age.

16. The second proviso to that Section, however, clearly lays down that in case the period of detention of a child is extended it shall in no case be beyond the time when the child attains the age of eighteen years in the case of a boy or twenty years in the case of a girl and the reasons have to be recorded for doing so. It may, however, be noted that the period of detention in every case can in no case be more than three years in view of what has been stated above.

17. So far as Section 23 of the Act is concerned, its relevance in this case is only to this extent that as per the provisions of Sub-section (1) thereof, no delinquent child can be sentenced to death or imprisonment or committed to prison in default of payment of fine, or in default of furnishing security. If the proviso to that section is to be made applicable, the Children's Court is enjoined upon returning a finding that it was satisfied that the offence in question committed by the delinquent child is of so serious a nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other children in a special school to send him to such special school etc. and then he has to be detained separately under intimation to the Government in this behalf and this the Government has to make arrangement for the detention of such a child. But even in such a case, again, the detention cannot be ordered for more than three years. In the instant case, however, since the Children's Court itself has sent him to a special school, the question of application of this Section to this case does not arise nor is there any such finding in the impugned judgment and

the Children's Court has, therefore, wrongly resorted to the provisions of this Section.

18. It is clear from the averments in the revision petition which have not been denied that the revisionist has already undergone detention in the special school for a period of four years which is beyond the powers of Children's Court, the impugned order of the Children's Court is, therefore, set aside to the extent it ordered the detention of the revisionist for a period beyond three years and in the result the detention order of the revisionist is quashed and he is ordered to be set at liberty at once.