
(1967) 10 MP CK 0004

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 627 of 1966

Sibbu alias Ramgopal alias Shambhu

APPELLANT

Vs

The State of Madhya Pradesh

RESPONDENT

Date of Decision : 24-10-1967

Acts Referred:

Penal Code, 1860 (IPC) — Section 376
Reformatory Schools Act, 1897 — Section 4(a)

Citation : (1968) MPLJ 33

Hon'ble Judges : S.P. Bhargava, J; R.J. Bhawe, J; N.M. Golvalker, J

Bench : Full Bench

Advocate : A. Usmani, for the Appellant; A.P. Sen, Advocate-General, for the Respondent

Final Decision : Allowed

Judgement

Shiv Dayal, J.

The Appellant has been convicted of an offence u/s 376, Penal Code, and sentenced to rigorous imprisonment for two years. Aggrieved by his conviction and sentence, he has preferred this appeal. His age is 15 years. One of the questions which I have to consider while deciding this appeal requires an authoritative pronouncement of a larger Bench of this Court.

The question is whether the provisions of the Reformatory Schools Act, 1897, apply to the case of an offence, the sentence for which may extend to imprisonment for life, (e. g. Sections 307, 326, 376, 377, 388 etc. etc.) The offence u/s 376, Penal Code, is such an offence. It is an accepted principle that sending of a youthful offender, whose antecedents are not shown to be bad to an ordinary prison may have the effect of making him a hardened criminal. The intention of the law, as manifests itself in the provisions of the Reformatory Schools Act is that, in suitable cases, offenders under the age of sixteen years should not be sent to ordinary prisons but their detention in Reformatory Schools should serve as a substitute for such punishment.

Before any provisions of the Reformatory Schools Act can be invoked, the offender must be a "youthful offender " within the meaning of Section 4(a) of that Act, which is in these words:

"Youthful offender" means any boy who has been convicted of an offence punishable with transportation or imprisonment.....and who, at the time of such conviction was under the age of sixteen years.

An essential ingredient of this definition is that the offence must be punishable with transportation or imprisonment. It is worthy of note that neither in the said interpretation clause nor in any other section of the Act "transportation" is defined. Nor is it qualified by prescribing any term. Thus, an offence punishable with transportation for life was within the purview of that definition. To put it differently, irrespective of the nature of the offence and irrespective of the term of sentence, whenever transportation or imprisonment could be awarded as punishment, and the sentence was in fact so awarded, to a boy under sixteen years of age, the Court had the discretion to exercise its powers under the Act, for instance, u/s 8 or Section 31. It is altogether different whether in the facts and circumstances of a particular case the Court decides to give the convict the benefit of that Act or not.

In Section 53 of the Penal Code, as it stood before 1955, "transportation" was one of the forms of punishment. But, let it be borne in mind, "transportation for life" was not enlisted as a separate category from "transportation". In AIR 1945 64 (Privy Council) the Privy Council observed that transportation was in truth a name given in India to the sentence for life. Referring to that decision, their Lordships said in *Gopal Vinayak Godse Vs. The State of Maharashtra and Others*, , that the word "transportation" was not defined in the Penal Code, but it was for life, with two exceptions. That the word "transportation" in Section 4(a) of the Reformatory Schools Act meant "transportation for life" must be deduced from *Rama v. Emperor* 4 NLR 180 (D.B.), where it was held that the Reformatory Schools Act is applicable to the case of a juvenile offender who has been convicted of murder and sentenced to transportation for life. See also *Ulla v. The King* AIR 1950 Orissa 261 (D.B.); and AIR 1937 274 (Nagpur) .

In 1955, "transportation", as a form of punishment, was abolished by virtue of the Code of Criminal Procedure (Amendment) Act, No. 26 of 1955, (hereinafter called the Amendment Act). Diverse provisions were made for substitution of "imprisonment for life" for "transportation". Section 53 of the Penal Code, as it stood prior to commencement of the Amendment Act, read thus:

53. Punishments to which offenders are liable under the provisions of this Code are:

First-death;

Secondly-transportation;

* * *

Fourthly-imprisonment which is of two descriptions, namely:

- (a) rigorous, that is, with hard labour;
- (b) simple.

* * * *

Transportation for life, which was prescribed for a number of offences, was not a separate category but was necessarily included in "Secondly, -transportation". What the Amendment Act did may be summed up thus:-(1) In Section 53 of the Penal Code, the expression "imprisonment for life" was substituted for "transportation" as a category for punishment separately from "Thirdly, imprisonment" (that is, imprisonment for any term except for life). (2) In clauses 3 to 18 of the Schedule u/s 117 of the Amendment Act, specific provisions were made for substitution of "imprisonment for life" for expressions containing the word "transportation" in various provisions of the Penal Code. In a nutshell "imprisonment for life" was substituted for all the three expressions, namely, (i) transportation for life (ii) transportation for a term or any shorter term; and (iii) transportation. (3) Aware of the fact that these expressions "transportation for life", "transportation for a term or any shorter term"; and "transportation" (simpliciter) were employed in other enactments as well, but without attempting to specifically and separately amend all those provisions, what the Legislature did was just to lay down the criteria for application; and this was done by introducing a new section in the Penal Code. It is Section 53-A. The material criteria may be summed up thus:

(i) "Transportation for life" in any other law is to be construed as "imprisonment for life" [per Sub-section (1)].

(ii) "Transportation for a term or transportation for any shorter term" (by whatever name called) in any other law, has to be omitted, [per Sub-section (3).]

(iii) Then Sub-section (4) of the new section runs thus:

Any reference to "transportation" in any other law for the time being in force shall,-

(a) if the expression means transportation for life, be construed as a reference to imprisonment for life;

(b) if the expression means transportation for any shorter term, be deemed to have been omitted.

It is obvious enough that wherever the expressions "transportation for life" or "transportation for a term" or "transportation for any shorter term" occur in any enactment other than the Penal Code, they stand amended as above: the first expression above is to be substituted by "imprisonment for life", while the other two are to be deleted. But, where in any enactment the word "transportation" (simpliciter) occurs, it has to be determined whether it means

"transportation for life" or "transportation for a shorter term". After such determination, in the former case it is to be substituted by "imprisonment for life", and in the latter it is to be deleted.

With that as the basis, it has to be determined whether the word "transportation" in Section 4(a) of the Reformatory Schools Act meant "transportation for life" or was limited to transportation for any term shorter than transportation for life. On giving a very considered thought, I find that the position is this: (1) The term "transportation" is not defined in the interpretation clause or in any other section of the Reformatory Schools Act. (2) There is nothing in the context to show that by necessary implication the word "transportation" was used so as to exclude transportation for life. For instance, there are no such provisions, general or particular, as exclude in terms the application of the Act to any offence punishable with transportation for life. (3) The general connotation of "transportation" was "transportation for life". Section 53, Penal Code, affords strongest support to this. Although transportation for life was prescribed as a punishment in many sections of the Penal Code, in Section 53 (where punishments are categorised) there was mention of "transportation" simpliciter. "Transportation for life" was not mentioned as any category of punishment in that section. It is then incontestable that "transportation" meant "transportation for life". (4) In AIR 1945 64 (Privy Council) , the Privy Council said that "transportation" was in truth a name given in India to the sentence for life. (5) In Gopal Vinayak Godse Vs. The State of Maharashtra and Others, , their Lordships referred to Kishorilal¹ and observed:

The word "transportation" was not defined in the Penal Code, but it was for life with two exceptions.

For the above reasons and on high authority, I am of the view that the word "transportation" in Section 4(a) of the Reformatory Schools Act, meant "transportation for life" and was not limited to "transportation for any shorter term".

Besides being fortified by the above Privy Council and the Supreme Court rulings, my view finds strong support in the three decisions to which I must now advert. In AIR 1937 274 (Nagpur) , a boy of 14 years was convicted for murder and sentenced to transportation for life by the Sessions Court. The Division Bench, while confirming the conviction for murder, directed the accused to be detained in a Reformatory School for a period of four years. It was observed as follows:

The depravity in the case before us is so innate. We have here to consider the case of a boy brought up in a comfortable home, a boy apparently of intellectual attainments above the average, but of a haughty and imperious disposition which has not been properly controlled, a boy who has been accustomed to treat the coolies with whom he inevitably comes in frequent contract as if they were beings of another order and bound to execute all his wishes without demur or question. Unaccustomed to having his desires thwarted and unfortunately having

a lethal weapon in his hands at the time, he lost control of himself and used it with a fatal effect. The discipline of a Reformatory School may well prove salutary to such a youth, whereas it would have been ineffective in the case of a youth so depraved as Rama and Channoo. Where the course of sending a youth to a Reformatory School is open to us, and we are of opinion that the discipline there obtaining would profit the youthful offender, we consider it our duty to take action under the provisions of that Act rather than simply to affirm the sentence of transportation for life and leave the decision of the degree of clemency to be exercised to the Legal Government.

In *Rama v. Emperor* 4 NLR 180 it was held that the Reformatory Schools Act is applicable to the case of a juvenile offender who has been convicted of murder and sentenced to transportation for life. In *Vila v. The King* AIR 1950 Orissa 261, the murder was committed by a boy of 12 years, who was sentenced to transportation for life by the Sessions Court. Panigrahi J., observed:

We uphold the conviction and maintain the sentence passed on him. In view, however, of the tender age of the Appellant, we do not think it proper that he should serve the sentence of transportation for life in a jail which will only make him a hardened criminal and mar his future life. We have, therefore, arrived at the conclusion that the proper action to be taken in this case would be to recommend the detention of the Appellant in a Reformatory School u/s 8, Reformatory Schools Act (Act VIII of 1897).

Jagannadhadas J. (as his Lordship then was) agreed and further observed that the accused was a youthful offender, although Section 302, Penal Code, is also punishable with death. "It is enough to satisfy the definition of "youthful offender" in the Act, if the offence of which he is convicted is also punishable with transportation",

All the three decisions just cited support the view that "transportation" in Section 4(a) of the Reformatory Schools Act means "transportation for life." If that was not so, the provisions of that Act could not be applied to an offender, who was found guilty of murder u/s 302, Penal Code. Above all, if transportation was another name for life imprisonment in AIR 1945 64 (Privy Council) and *Gopal Vinayak Godse Vs. The State of Maharashtra and Others*, , what else could be the import of that expression in Section 4(a) of the Act and for which case was meant? When, by virtue of the Amendment Act, No. 26 of 1955, the punishment of transportation was abolished and in Section 53, Penal Code, "transportation" was substituted by "imprisonment for life", there is nothing to show that the intention of the Legislature was to deny the benefit of the provisions of the Reformatory Schools Act to an offender when before the amendment, the Court could give them.

As soon as the conclusion reached is that "transportation" in Section 4(a) of the Reformatory Schools Act meant "transportation for life", then, by virtue of Section 53-A(4) of the Penal Code, the word "transportation" in Section 4(a) of

the Reformatory Schools Act must be read as substituted by the expression "imprisonment for life". And, then, the provisions of that Act became applicable even to offences (such as Sections 309, 326, 376 and 377) where punishment may extend to imprisonment for life.

But, in *Gangaram Raghunath Vs. State of M.P.*, (Criminal Appeal No. 347 of 1962 decided on the 28th October 1963), on a difference of opinion between two Judges constituting the Divisional Bench, which heard that case, the third learned Judge (to whom the case was referred because of the difference) held that an offender who is guilty of an offence punishable with imprisonment for life is outside the purview of "youthful offender" within the meaning of the Reformatory Schools Act, inasmuch as now, u/s 53 of the Penal Code, the punishment of imprisonment for life is a category different from the one providing punishment of imprisonment, rigorous or simple. It was further held that an offence, though it is punishable with imprisonment for life, is not included in the offence referred to in Section 4(a) of the Act, if it is also punishable with death. Since in that case *Rama v. Emperor* 4 NLR 180 and AIR 1937 274 (Nagpur) were referred to but the conclusion reached was in conflict with them, I am asked to follow the earlier decisions in preference to *Gangaram*³, as was done in *Sashi Bhusan v. Bhuneshwar* AIR 1955 Pat. 124 = ILR 33 Pat. 1009 (1018); *Basant Lal Sah Vs. Bhagwati Prasad Sah*, . I do not feel persuaded to follow that course for two reasons. Firstly, it is not in concordance with judicial propriety and decorum that Judges, sitting singly, may go on following such divergent decisions of Division Benches of their Court as support their individual opinions. Such a course exposes the litigants to untold hardship and taking chances in litigation. In *Mahadeolal Kanodia Vs. The Administrator-general of West Bengal*, , their Lordships observed thus:

Before we part with this appeal, however, it is our duty to refer to one incidental matter. We have noticed with some regret that when the earlier decision of two Judges of the same High Court in *Deorajin Debi and Another Vs. Satyadhyan Ghosal and Others*, , was cited before the learned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger Bench. Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all Courts subordinate to the High Court would

find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court".

Again in Jaisri Sahu Vs. Rajdewan Dubey and Others, , their Lordships said:

When a Bench of the High Court gives a decision on a question of law, it should in general be followed by other Benches unless they have reasons to differ from it, in which case the proper course to adopt would be to refer the question for the decision of a full Bench. In Buddah Singh v. Laltu Singh ILR 37 All. 604 = AIR 1915 PC 70 the Privy Council had occasion to discuss the procedure which should be adopted when a Bench of a High Court differs from the opinion given by a previous Bench.. -..The Privy Council observed:

..It is usual in such cases where a difference of opinion arises in the same Court to refer the point to a Full Bench and the law provides for such contingencies. Had that course been followed their Lordships would probably have had more detailed reasoning as to the change of opinion on the part at least of one Judge.

The law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions and it is therefore desirable that in case of difference of opinion, the question should be authoritatively settled. It sometimes happens that an earlier decision given by a Bench is not brought to the notice of a Bench hearing the same question and a contrary decision is given without reference to the earlier decision.....The practice in the Patna High Court appears to be that in those cases, the earlier decision is followed and not the later.....The better course would be for the Bench hearing the case to refer the matter to a Full Bench in view of the conflicting authorities without taking upon itself to decide whether it should follow the one Bench decision or the other.

And, in Shri Bhagwan and Another Vs. Ram Chand and Another, , their Lordships have expressed themselves emphatically in these words:

...If a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question.

Secondly, the question is of frequent recurrence. There are many offences punishment for which extends to transportation for life (now imprisonment for life). One of such offences is voluntarily causing grievous hurt punishable u/s 326, Penal Code. If the intent and purpose behind the Reformatory Schools Act is to protect, in suitable cases, youthful offenders from coming in contact with criminals in ordinary jails and come out from them as hardened criminals themselves; and if the policy of the law is to afford an opportunity to such juvenile offenders to turn over a new leaf, the law should be certain on the question whether the provisions of that Act can be extended even to cases where

the conviction is of an offence punishable with imprisonment for life. In the Rules of this Court it is provided that if a Judge sitting alone considers that the decision of a case pending before him involves a reconsideration of a decision of two or more Judges, may refer it to the Chief Justice with recommendation that it be placed before a Full Bench for decision of the stated question or questions.

In my opinion, the decision in Gangaram Raghunath Vs. State of M.P., (Criminal Appeal No. 347 of 1962 decided on the 28th October 1963), requires reconsideration. It appears to be in conflict with the decisions in Rama v. Emperor 4 NLR 180, and Daljit Singh v. Emperor³, The question should, in the interest of uniformity and certainty, be decided by a Full Bench. The question for decision of the Full Bench may be formulated thus:

Whether the expression "transportation" in Section 4(a) of the Reformatory Schools Act, meant "transportation for life", and, therefore, now means "imprisonment for life". Let the case be laid before my Lord the Chief Justice for constituting a Full Bench for the decision of this question.

OPINION

R.J. Bhawe J.

The following question has been referred to us for our decision:

Whether the expression "transportation" in Section 4(a) of the Reformatory Schools Act meant "transportation for life" and, therefore, now means "imprisonment for life"?"

The question has been referred because, according to the learned single Judge (Shiv Dayal J.), there is a conflict between the two decisions, namely, Rama v. Emperor¹ and AIR 1937 274 (Nagpur) on the one hand, and Gangaram Raghunath Vs. State of M.P., (Criminal Appeal No. 347 of 1962 decided on the 28th October 1963).

The Appellant in this case has been convicted of an offence u/s 376 of the Indian Penal Code and has been sentenced to rigorous imprisonment for two years. The punishment prescribed u/s 376 of the Indian Penal Code is imprisonment for life or imprisonment of either description for a term which may extend to ten years and also fine. The Appellant is aged 15 years. One of the questions which came before the learned single Judge while deciding the appeal was whether in such a case the provisions of the Reformatory Schools Act, 1897 could be applied. That depends on the interpretation of Section 4(a) of the Reformatory Schools Act which contains the definition of a "youthful offender". The definition of a youthful offender", with the local amendment, reads thus: "4. Definitions.

In this Act, unless there is anything repugnant in the subject or context.-

Youthful offender" means any boy who has been convicted of any offence punishable with transportation or imprisonment or who has been sentenced to imprisonment u/s 123 of the Code of Criminal Procedure, 1898, and who at the

time of such conviction or sentence, was under the age of sixteen years;

In this definition, there is reference to punishment of "transportation" or "imprisonment" and no reference to "imprisonment for life". Hence, the question has been posed for our decision.

Section 53 of the Indian Penal Code, before its amendment in 1949, prescribed the following penalties:-

First,-Death;

Secondly,-Transportation;

Thirdly,-Penal Servitude;

Fourthly,-Imprisonment, which is of two descriptions, namely:

(1) Rigorous, that is, with hard labour;

(2) Simple; Fifthly,-Forfeiture of property; Sixthly,-Fine.

After its amendment in 1949 and 1955, the section reads thus: "First,-Death Secondly,-Imprisonment for life Thirdly,-(Repealed by Act No. 17 of 1949)

Fourthly,-Imprisonment, which is of two descriptions, namely:

(1) Rigorous, that is, with hard labour;

(2) Simple Fifthly,-Forfeiture of property Sixthly,-Fine.

These amendments were necessitated because for a long time persons sentenced to transportation were not sent out of India and they were confined in the Indian prisons and the sentence of transportation for life was treated as if it was a sentence of imprisonment for life. This matter came up before their Lordships of the Privy Council in AIR 1945 64 (Privy Council) wherein their Lordships observed thus:

In England transportation beyond the seas ceased as a punishment in 1854. In India it is still part of the penal system, but Acts passed since the Penal Code have effected so radical a change in the law relating thereto that, whatever may have been the case in 1860, Section 58 can no longer be construed as providing only for the transitory detention of prisoners awaiting conveyance to a penal settlement outside India. A sentence of transportation no longer necessarily involves prisoners being sent overseas, or even beyond the province wherein they were convicted So, in India, a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners, where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment.

From this decision it is clear that in all those cases where a person was sentenced to transportation for life, it was treated as if it was a sentence of life-imprisonment. This is the reason why in 1955, Section 53 of the Indian Penal

Code was amended so as to delete the punishment of "transportation" and to substitute it by the punishment of "imprisonment for life". There was reference to the punishment of transportation in other enactments also. Hence, in 1955 Section 53-A was added which reads thus:

53A. Construction of reference to transportation.

(1) Subject to the provisions of Sub-section (2) and Sub-section (3), any reference to "transportation for life" in any other law for the time being in force or in any instrument or order having effect by virtue of any such law or any enactment repealed shall be construed as a reference to "imprisonment for life."

(2) In every case in which a sentence of transportation for a term has been passed before the commencement of the Code of Criminal Procedure (Amendment) Act, 1955, the offender shall be dealt with in the same manner as if sentenced to rigorous imprisonment for the same term.

(3) Any reference to transportation for a term or to transportation for any shorter term (by whatever name called) in any other law for the time being in force shall be deemed to have been omitted.

(4) Any reference to transportation" in any other law for the time being in force shall,-

(a) as if the expression means transportation for life, be construed as a reference to imprisonment for life;

(b) if the expression means transportation for any shorter terms, be deemed to have been omitted.

The effect of this section is twofold: (1) that wherever there is any reference to "transportation for life" in any other law for the time being in force, it should be construed as a reference to "imprisonment for life"; and (2) wherever there is a reference to "transportation for a shorter term", it should be deemed to have been omitted. Now, Section 4(a) of the Reformatory Schools Act refers to the punishment of "transportation". If the expression "transportation" is taken to include "transportation for life" or "transportation for a shorter term", the effect of Section 53-A of the Penal Code would be that in place of the word "transportation" the words "imprisonment for life" would have to be substituted. The definition of a "Youthful offender" reconstituted with reference to the said amendments would then read as under:

"Youthful offender" means any boy who has been convicted of any offence punishable with imprisonment for life or imprisonment or who has been sentenced to imprisonment u/s 123 of the Code of Criminal Procedure, 1898, and who at the time of such conviction or sentence was under the age of sixteen years;

If the definition is so read, no manner of doubt is left that a person convicted of an offence, which is punishable with a sentence of imprisonment for life can be

dealt with under the provisions of the Reformatory Schools Act and the answer to the question posed must be given in the affirmative.

The learned Single Judge, however, feels that there is a conflict between the decisions of this Court, referred to above, and that *Gangaram Raghunath Vs. State of M.P.*, leaves certain measure of doubt as to whether on the true interpretation of Sections 53 and 53-A of the Indian Penal Code, the expression "transportation" in the definition of "Youthful offender" in the Reformatory Schools Act should be altogether omitted or should be substituted by the words "imprisonment for life". At least, that is what we could gather from the Order of Reference.

It is no doubt true that there is a conflict between *Rama v. Emperor* 4 NLR 180 and AIR 1937 274 (Nagpur) on the one hand, and *Gangaram Raghunath Vs. State of M.P.*, on the other, and that the decision in *Gangaram's case*¹ had not the effect of overruling the previous decisions. But the question of resolving that conflict does not really arise in the present case. In those cases the question at issue was as to whether a person convicted of an offence, the highest punishment for which was death, could be dealt with under the Reformatory Schools Act if the offender was awarded the lesser punishment, namely, that of imprisonment for life. In those cases no dispute was raised that in place of the expression "transportation" the words "transportation for life" or "imprisonment for life" could not be substituted. Those cases proceeded on the assumption that the expression "transportation" means "transportation for life". We, however, propose to decide as to what view is correct, as it is necessary that the two conflicting views should not be allowed to hold the field at the same time.

In *Rama's case* 4 NLR 180, the accused was found guilty of murder punishable u/s 302, Indian Penal Code where the punishment prescribed was death or transportation for life. The question which came up for decision before the learned Additional Judicial Commissioner was whether the words "punishable with transportation or imprisonment" are to be read as inapplicable to offences also punishable with death. This is what the learned Additional Judicial Commissioner observed:

The provision under discussion requires that the offence, for which the candidate for a Reformatory School is convicted, should be punishable with imprisonment or transportation, but it obviously does not require that such offence should not be subject to any other form of punishment. If that were so, then it would be impossible to find any offence for which a youthful offender could be sent to a Reformatory School. If the words "punishable with imprisonment or transportation"¹ are to be read as inapplicable to offences also punishable with death, then, consistency of construction would make them equally inapplicable to offences also punishable with fine, forfeiture, or whipping. Therefore, it seems to follow that all that is necessary to satisfy the requirements of the Reformatory Schools Act, 1897, as to an offender under the age of 15 years, is that he should be convicted of an offence which includes imprisonment or transportation among

the forms of punishment provided for it by law.....Murder is capable of punishment by transportation, and, in a case where in fact such punishment is decided upon, it seems to me that the convict, if of proper age and otherwise a fit person for attempted reform, is eligible as a pupil for a Reformatory School.

A similar view has been expressed by Jagannadhadas J. in *Vila v. The King* AIR 1950 Orissa 261 at p. 264;

I agree also that this is a case in which in exercise of our powers u/s 8, Reformatory Schools Act, the Appellant, instead of having to undergo the sentence of transportation, should be sent to a reformatory school for a period of five years. It is not disputed before us that the Appellant is a "Youthful offender" as defined. He is none-the-less so, though Section 302, Penal Code, is also punishable with death. It is enough to satisfy the definition of "youthful offender" in the Act if the offence of which he is convicted is also punishable with transportation.

In AIR 1937 274 (Nagpur) the accused was convicted of an offence punishable u/s 302, I.P. C. and was sentenced to transportation for life. In that case, the Division Bench observed:

That such action is possible in the case of a youthful offender who has been sentenced to transportation for life has been held by Stanyon, A.J. C. in *Rama v. Emperor* 4 NLR 180, and this has been accepted later in Criminal Appeal No. 27 of 1926. We are in respectful agreement with the decision in *Rama v. Emperor* 4 NLR 180 and hold that recourse may be had to the Reformatory Schools Act if such action is desirable.

It would thus be seen that in the Orissa case AIR 1950 Orissa 261 at p. 264 there is no discussion of the matter, and the reasoning which was advanced by the learned Judge was that if one of the sentences prescribed under the particular section was transportation and if the accused was in fact awarded that sentence, the provisions of the Reformatory Schools Act applied to his case notwithstanding the fact that the offence could as well be punished with death. In *Daljit Singh's case*¹, the decision in *Rama's case* 4 NLR 180 was simply accepted which means that the reasoning of the learned Additional Judicial Commissioner was approved by the Division Bench.

In *Gangaram Raghunath Vs. State of M.P.*, , the matter came up for hearing before a Division Bench consisting of Naik and Shiv Dayal J J. The accused, who was a boy of 13 or 14 years of age, was convicted u/s 302 of the Indian Penal Code and was sentenced to imprisonment for life. In appeal both the learned Judges came to the unanimous conclusion that the accused was rightly convicted. Shiv Dayal J., however, was of the opinion that the accused came within the definition of a "Youthful offender" and that the provisions of the Reformatory Schools Act were applicable to him. This is what Shiv Dayal J. held:

The offence u/s 302 of the Penal Code is punishable not only with transportation

for life but also with death.

Is the offence, therefore, excluded from the purview of the above definition? (the definition of "Youthful offender"). To put it differently, is the above" definition restricted to the offences which are punishable only with transportation or with imprisonment and is inapplicable to an offence which is also punishable with death?

The object of the enactment is obvious enough. Sending of youthful offenders to ordinary jails has the effect of making them hardened criminals. They were to be safeguarded against this evil irrespective of the term of imprisonment or transportation so that the definition is so widely worded as to bring within its scope every offence which is punishable with transportation or imprisonment irrespective of the term. The only offences to which the definition does not apply- and there is no point in applying it to them-are those for which the law does not provide for punishment with transportation or imprisonment at all. Section 53 of the Penal Code, as it was worded when the Reformatory Schools Act, 1897, was enacted, enumerated six kinds of punishments. Then this evil which was intended to be safeguarded against by the Act was present only in the punishment with transportation or imprisonment but not in others, e. g., death sentence or sentence of forfeiture of property or fine. To an offence for which death penalty alone is provided (see Section 303 of the Penal Code), or where only fine can be imposed, application of this Act is meaningless. On a natural and plain meaning of Section 4(a) the very fact that an offence is punishable with transportation or imprisonment is sufficient. If the intention of the Legislature were to exclude those offences which are punishable with death also, the wording would have been "any offence not punishable with death," instead of "any offence punishable with transportation or imprisonment".

On this analysis, the only questions to be asked are:

- (1) Is the offence punishable with transportation? and
- (2) Is the offence punishable with imprisonment?

If the answer to either of them is in the affirmative, then it is within Section 4(a) of the Act; if the answers to both of them are in the negative, then only the offence will be outside the definition. Therefore, in my judgment, it is enough to bring an offence u/s 8, read with Section 4(a) of the Reformatory Schools Act, 1897, that the offence is punishable with transportation or imprisonment and it is immaterial that it is also punishable with death or fine or any other kind of punishment. This view is supported in *Ulla v. The King* AIR 1950 Orissa 261 (D.B.)....

Naik J. took a contrary view. Naik J., after considering the effect of the amendment of Section 53 andj the addition of Section 53-A to the Indian Penal Code, reconstituted the definition of a "Youthful offender" thus:

...a "Youthful offender" means-

"any boy who had been convicted of any offence punishable with imprisonment or who has been sentenced to imprisonment u/s 123 of the Code of Criminal Procedure, 1898, and who, at the time of such conviction or sentence, was under the age of sixteen years.

and on that basis proceeded to consider the question. The reasoning adopted by Naik J. is as under:

The question, therefore, arises whether the accused-appellant is a "youthful offender" within the meaning of the Act. This in turn raises the question whether an offence u/s 302 of the Indian Penal Code can be said to be "any offence punishable with imprisonment" within the meaning of the aforesaid definition.

Section 53 of the India Penal Code tells us that there are five kinds of punishments to which offenders are liable under the provisions of the Code,—first, Death; secondly, Imprisonment for life; thirdly, Imprisonment (rigorous or simple); fourthly, Forfeiture of property; and fifthly, Fine. It is also the scheme of the Code that generally maximum punishments are prescribed leaving the minimum to the discretion of the Judge who would have the means in each case of forming an opinion as to what sentence would meet the ends of justice in that particular case. However, in offences of the gravest nature, it has prescribed both the maximum and minimum punishments. Keeping this scheme in view, I am of opinion that in any attempt at classification of offences with reference to punishments prescribed for them, it would be more in consonance with the aforesaid principle to understand the classification as implying that the offences have been classified with reference to the maximum punishments to which an offender may be liable in respect of them. Thus, when we speak of a capital offence, we imply that an offender committing it is liable to be sentenced to death, not that he must necessarily be sentenced to death, for in most cases imprisonment for life has been also prescribed as an alternative sentence to the sentence of death. In my opinion, the word "punishable" when used in the phrase "punishable with imprisonment" as categorising offences with reference to punishments, itself implies a liability to punishment which is the highest in the hierarchy of punishments for that class of offences.

The expression "offences punishable with imprisonment" ordinarily has two meanings. It may mean offences in which imprisonment is one of the permissible punishments prescribed, or it may mean offences, the commission of which exposes the offender to imprisonment as its highest penalty, though, in fact, he may be sentenced to any prescribed sentence short of that. What meaning the expression bears in a particular context would depend on its use in that context; and in my opinion, when used to categorise offences so that offenders committing them are to be differently sentenced, then it must bear the latter meaning.

On this view, broadly speaking, there can be offences punishable with death, i.e., offences for which the maximum penalty to which an offender can be subjected

is death; offences punishable with imprisonment for life, i.e., offences for which the maximum penalty can be imprisonment for life; offences punishable with imprisonment, i.e., offences for which the maximum penalty can be imprisonment short of imprisonment for life; and, lastly, offences punishable with fine, i.e., offences for which the maximum penalty can be a sentence of fine only. It would thus be seen that "imprisonment for life" is a form of punishment distinct from imprisonment simpliciter and both are distinct and different from the sentence of death; and, in my opinion, "offences punishable with imprisonment" cannot be equated with "offences punishable with imprisonment for life", which must be treated as offences of a separate category. For, whereas the former, viz., "imprisonment", can be of two categories-simple and rigorous-, the latter, viz., "imprisonment for life", can only be rigorous; and, again, whereas "imprisonment" can be for any period from twenty four hours to fourteen years in accordance with the period prescribed in the Penal Code, the sentence of "imprisonment for life" can mean but one thing, namely, rigorous imprisonment for twenty years.

An offence u/s 302 of the Penal Code is punishable with death, or imprisonment for life, and also with fine. The law thus prescribes for that offence a maximum as well as a minimum punishment. The minimum punishment prescribed is, no doubt, imprisonment for life; but, as explained above, it cannot be said that it is a form of punishment which is included in the expression "imprisonment" as used in Section 53 of the Code or Section 4(a) of the Act. In any case, it cannot be said that murder is an offence which is "punishable with imprisonment". To so describe it would be a misdescription of that offence. Some help in the interpretation of the clause can also be derived from the phraseology in Section 4(a) of the Act. It makes a distinction between an offender who has been convicted of any "offence punishable with imprisonment" and an offender who has been "sentenced to imprisonment"; and I think that this distinction is not without substance. "Liability to punishment for an offence" is something different: from the actual sentence awarded therefore. While, the first implies the limit to which a sentence can go, the second implies that which the justice of the case warrants or requires under the facts and circumstances of any particular case. The fact, therefore, that a sentence of "imprisonment for life" can be awarded for an offence u/s 302 of the Penal Code cannot warrant its being called an offence "punishable with imprisonment". If it were the intention of the Act to include within the ambit of the expression "punishable with imprisonment" all offenders against whom a sentence of imprisonment had been passed irrespective of the nature and gravity of the offence of which they had been convicted, it could well have more simply defined the expression "youthful offender" u/s 4(a) by saying as "any boy who has been convicted of any offence and sentenced to imprisonment therefore & c." If the mere fact of having been sentenced to a term of imprisonment for any offence were the criterion to attract the provisions of the Act, it would not have been necessary to correlate the conviction with an offence "punishable with imprisonment". On the other hand,

the fact that the Legislature has attempted to correlate convictions with the offences and not with the sentence of imprisonment, and at the same time classifying the offences with reference to punishment, shows that the mere fact that an offender was sentenced to a term of imprisonment was not enough as it was further necessary that the offence was of a class which was "punishable with imprisonment". So that, if the offence was punishable with something more than imprisonment, viz., with death or imprisonment for life, then it was not meant to be included amongst the offences to which reference was made in Section 4(a) of the Act." (pp. 124-125)

On difference of opinion between the two learned Judges, the matter was referred to the third Judge for his opinion on the question. Pandey J. agreed with Naik J. He held:

"I am of the view that murder cannot be called an offence punishable with imprisonment only because the lesser penalty for that offence is imprisonment for life. As provided by Section 53 of the Indian Penal Code, the punishment of imprisonment for life is in a category different from the one providing for the punishment of imprisonment, rigorous or simple. Secondly, it is usual to describe an offence with reference to the maximum punishment provided therefore. An example is Section 497, Code of Criminal Procedure. Under that section, bail cannot be granted if there are reasonable grounds for believing that the accused has been guilty "of any offence punishable with death or imprisonment for life". This expression has been interpreted disjunctively as including offences like those u/s 307 of the Indian penal Code, the maximum sentence for which is imprisonment for life: *King-Emperor v. Nga San Htwa* ILR 5 Rang. 276 (F.B.), *Naranji Premji Vs. Emperor*, and *Emperor v. Mat. Janki* AIR 1932 Nag. 130 = 28 NLE 260. Finally I do not consider it right to interpret Clause (a) of Section 4 of the Act as if it did not take into account the gravity of the offence and merely provided for substituting in all cases the sentence of imprisonment by a term in the Reformatory School. If it were so, that could have been more easily provided as follows:

Youthful offender" means any boy who has been convicted of any offence and sentenced to imprisonment or who has been sentenced to imprisonment u/s 123 of the Code of Criminal Procedure, 1898, and who, at the time of such conviction or sentence, was under the age of sixteen years.

In my opinion, the offence of murder, which is punishable with death or imprisonment for life, is not included in the offences referred to in Clause (a) of Section 4 of the Act.

From the extracts of the decision in Rama's case 4 NLR 180 (D.B.) quoted above, it is clear that the learned Additional Judicial Commissioner proceeded on the view that if an accused convicted of an offence punishable u/s 302 of the Indian Penal Code is excluded from the definition of a "Youthful offender" in Section 4(a) of the Reformatory Schools Act on the ground that the punishment

prescribed under that section is not only transportation but death as well, then in that case offenders convicted of offences, wherein the punishment of transportation or imprisonment is prescribed but in addition or alternatively the punishments of forfeiture, fine etc., are prescribed, shall also be excluded and the Reformatory Schools Act will become inapplicable to majority of the cases. It was, therefore, held that the enquiry should be directed to see as to whether the punishments of transportation or imprisonment are prescribed for that particular offence or not. The fact that any other punishment is also prescribed is wholly irrelevant. Naik J., on the contrary, adopted the reasoning that when one speaks of an offence punishable with a particular sentence, one always speaks of the highest punishment that is prescribed for that particular offence and, therefore, it is immaterial in deciding this question to consider whether any other punishment is prescribed for that offence or not. Naik J. also emphasises the fact that in determining the scope of Section 4(a) of the Reformatory Schools Act the enquiry is not to be directed to find out what punishment is actually inflicted but the enquiry is to be directed to find out as to what punishment is prescribed under that-particular section. If the punishment prescribed is death, then certainly the person, even though he is sentenced to transportation, cannot be included in the definition of a "Youthful offender". We find it difficult to accept the reasoning of the learned Additional Judicial Commissioner in Rama's case 4 NLR 180 (D.B.).

The expression used in Section 4(a) of the Reformatory Schools Act is "punishable" and not "punishable also". In our opinion, it would be inappropriate to describe an offence as punishable with fine when the higher sentence prescribed is imprisonment for life or any shorter period. We, therefore, respectfully adopt the reasoning given by Naik J. in Gangaram Raghunath Vs. State of M.P., and hold that in all those cases, where an accused is convicted of an offence punishable with a sentence higher than the sentence of transportation which means imprisonment for life or imprisonment, the accused is not included within the definition of a "Youthful offender".

In passing, we may observe that there is one more case of the Nagpur High Court reported in AIR 1942 74 (Nagpur) wherein it was held by Niyogi J. (as he then was) that the expression "youthful offender" could not include the case of a boy under the age of 16 years at the time of conviction and sentence who had been convicted of any offence punishable with death. In that case, the Court was called upon to consider the definition of "Youthful offender" as given in Section 3 of the C.P. and Berar Children Act, 1928. The purpose of Section 3 is to amend the definition of "Youthful offender" occurring in Section 4(a) of the Reformatory Schools Act. In that case, unfortunately, no reference was made to Rama's case 4NLR 180 (DB.) or to that of AIR 1937 274 (Nagpur) and the point was decided on the first impression. There is also no discussion on the point.

In AIR 1937 274 (Nagpur) , the Division Bench of the Nagpur High Court accepted the decision in Rama's case 4NLR 180 (DB.) without any discussion. In

the Orissa case AIR 1950 Orissa 261 (D.B.), Jagannadhadas J. concluded the matter by observing:

It is enough to satisfy the definition of "Youthful offender" in the Act if the offence of which he is convicted is also punishable with transportation.

We respectfully differ from both the judgments.

In Gangaram Raghunath Vs. State of M.P., , Naik J., reconstituted the definition of a "Youthful offender" in the light of the amended provisions of Sections 53 and 53-A of the Penal Code thus:

"Youthful offender" means-

"any boy who has been convicted of any offence punishable with imprisonment or who has been sentenced to imprisonment u/s 123 of the Code of Criminal Procedure, 1898, and who, at the time of such conviction or sentence, was under the age of sixteen years.

It appears that through inadvertence Naik J. omitted to substitute for the word "transportation" the words "imprisonment for life." We have already given our reasons why in the reconstituted definition the expression "transportation" should be substituted by the expression "imprisonment for life". On this interpretation of ours, no further difficulty should arise in applying the provisions of the Reformatory Schools Act in the case of persons who are convicted of offences, the highest punishment for which is imprisonment for life.

For the aforesaid reasons, we agree with the view expressed by Naik J. in Gangaram Raghunath Vs. State of M.P., and hold that the decisions in Rama v. Emperor 4NLJ 180 (DB.) and AIR 1937 274 (Nagpur) do not lay down the correct law. We also hold that in the definition of "Youthful offender" in Section 4(a) of the Reformatory Schools Act for the expression "transportation" the expression "imprisonment for life" should be substituted, 14. We answer the reference accordingly. The appeal came up for hearing before Shiv Dayal J. who delivered the following judgment:

The Appellant has been convicted of the offence u/s 376 of the Penal Code and sentenced to two years" rigorous imprisonment for having committed rape on Kumari Janki a girl of 7 or 8 years.

The prosecutrix and the Appellant lived in the same locality. On the day of occurrence, while she was playing outside her house, the Appellant happened to pass that way. He showed her some coins and took her to a lonely place-a cattle pen-and committed rape on her. She started bleeding. Her cries attracted an elderly lady in the vicinity, who thought that she was being beaten by somebody. After the act, the girl was released by the accused. Her elder sister, Smt. Vidyabai, having come to know that the girl was crying, took her in her lap to her house. Janki's clothes were smeared with blood. The matter was reported to the Police. Janki was medically examined. Blood stains on the clothes of Janki, on the

underwear of the accused and blood-stained earth, which was seized from the cattle-pen, were chemically examined. The serologist found human blood on all the three articles.

There is no direct evidence of actual rape, except that of the prosecutrix herself. Her deposition was recorded by the trial Judge with all necessary care and caution. Ultimately, he has relied on her testimony and, has also found ample corroboration in the attending circumstances.

I have gone through the entire material on record. There is no reason to disbelieve Janki. Her statement is coherent and having regard to her tender age, whatever she could describe in her own way, leaves no manner of doubt that the Appellant committed rape on her. In her own innocent words, she has described how the accused had carnal knowledge of her. Her evidence must be believed.

Janki's statement is overwhelmingly corroborated by the following circumstantial evidence: (1) Statements of her sister, Vidyavati (P. W 3), and her mother, Jirabai (P.W. 2), to whom, soon after the occurrence, the girl gave out the name of the Appellant as the person responsible for the crime committed on her; (2) presence of human blood on the clothes of the girl; (3) presence of human blood on the underwear of the accused; (4) absence of smegma from, and presence of redness on the private parts of the Appellant; (5) an abrasion on the elbow of the Appellant; and (6) stains of human blood on the earth seized from the spot of occurrence.

For these reasons, the conviction of the Appellant must be maintained.

As regards sentence of two years, it cannot be said to be excessive. However, having regard to the fact that the age of the Appellant at the time of the commission of the offence was 14 or 15 years (date of offence being 19 April 1966), and since it appears to me that it was a sudden fit of passion and excitement which prompted him to commit the offence, I am of the opinion that the Appellant is a proper person to be an inmate of a Reformatory School.

In the result, the appeal is partly allowed. While the conviction and sentence are maintained, I direct that instead of undergoing his sentence, the Appellant shall be sent to a Reformatory School and be there detained for a period of two years.

Conviction maintained, accused sent to Reformatory School.