Mohamed Khalid Vs. State

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Court : Delhi

Decided On : Aug-27-1987

Reported in : 33(1987)DLT277

Judge : Charanjit Talwar and; M.K. Chawla, JJ.

Acts : Children Act, 1960 - Sections 2; Indian Penal code, 1860 - Sections 302; Children Act, 1960 - Sections 21(1)

Appeal No. : Criminal Appeal No. 246 of 1983

Appellant : Mohamed Khalid

Respondent : State

Advocate for Def. : Mr. Lao

Advocate for Pet/Ap. : R.K. Jain,; Shakeel Ahmed,; Saleem Siddiqui and;

Judgement :

Charaniit Talwar, J.

(1) By this appeal, Mohd. Khalid, appellant herein challenges his conviction under Section 302 of the Indian Penal Code. The legality of the sentence of life imprisonment is also sought to be quashed.

(2) During the pendency of this appeal, the appellant herein moved an application (CrI.M. 2158/84) whereby it was pleaded that be was a child within the purview of Section 2(e) of the Children Act, 1960, and as such was not liable to be tried by the Court of Addl. Sessions Judge, Delhi. After hear- ing the parties, this Court remanded the case to the Addl. Sessions Judge to record evidence on the point of age of the appellant. The learned Addl. Sessions Judge Shri P.S. Sharma recorded the evidence of three witnesses pro- duced on behalf of the appellant. Although the right had been granted to rebut the evidence but the State has not chosen to do so. The three witnesses were Raisa Begum, mother of the appellant (DW-D/Gulam Mohamed, an employee of the Municipal Board of Sambal, the birth place of the appellant (DW-2) and 0m Parkash, an Assistant Teacher in Jahangir Puri, (DW-3), in which school the appellant studied up to 4th class.

(3) According to Raisa Begum (DW-I) she was married in the year 1964. The appellant was born after 4 years of the marriage and is the eldest child. In cross-examination, ii, is brought out that the age of the appellant's mother was little more than what was given in the marriage certificate (Nikahnama). A suggestion was put to her that the appellant was not born after 4 years of her marriage and he had been born earlier but she denied the same. It is the documentary evidence produced by DW-2 Gulam Mohd. and DW-3 0m Parkash which clinches the issue. The birth certificate produced by Gulam Mohd. was exhibited as DW2/A. From the said document, it appears that a son was born to Mohd. Hussan on 1st September, 1968. (the appellant's father's name is Mohd, Hussan). It is further certified that the document is correct as per the entry contained in the birth register maintained by the Municipality of Sambal, District Moradabad, Uttar Pradesh. The school leaving certificate DW-3/A produced by 0m Parkash (DW-3) shows the birth of the appellant as 10th November, 1968. The appellant was admitted in that school on 2nd November, 1977 in class-I. He left that school in 1980.

(4) As we have noticed earlier, the State ^id not choose to produce any evidence to rebut this averment of the appellant. There is a slight discrepancy in the school record and the birth certificate produced by the clerk of the Municipality (DW-2). According to the school certificate, the appellant was born on 10th November. 1968 and as per certificate of Municipality, DW2/A, the appellant was born on 1st

September, 1968. We accept the date of birth of the appellant as shown in the certificate of Municipality. In that view of the matter, the appellant was just about 14 years on the date of commission of the offence i.e. 10th June, 1982. Thus, he could not have been tried by the court of Addl. Sessions Judge, Delhi, and could have only been tried under the pro- visions of Children Act, 1960. In view of our finding that the appellant was a child at the time of commission of the offence, Mr. Lao learned counsel for the respondent agrees that the trial was bad.

(5) Mr. Jain, learned counsel for the appellant states that in the event this Court remands the case for retrial by the Children Court, the appellant has to be released as at this stage that Court would not be competent to send the appellant who has attained the age of 18 years to an approved school. In support of his submissions, the learned counsel relies upon Jayendra v. State of U.P., : 1982 CriLJ1000 . In the said case, the question of the age of the appellant in that case arose for the first time before the Supreme Court. The appellant was asked to appear before a doctor of the Jail hospital for the purposes of examination as regards his age. It was found on a rough approximation after the report was received that he was a child when the offence was committed. But by the time the report was received the appellant had attained the age of 23 years. Their Lordships after noticing all these facts, and the provisions of Uttar Pradesh Children Act, 1951, held :

'SECTION2(4) of the Uttar Pradesh Children Act, 1951 (U.P. Act No. I of 1952) defines a child to mean a person under the age of 16 years. Taking into account the various circumstances on the record of the case we are of the opinion that the appellant Jayendra was a child within the meaning of this provision on the date of the offence. Section 27 of the aforesaid Act says that notwithstanding anything to the contrary in any law, no court shall sentence a child to imprisonment for life or to any term of imprisonment. S. 2 provides, in so far as it is material, that if a child is found to have committed an offence punishable with imprisonment, the court may order him to be sent to an approved school for such period of stay as will not exceed the attainment by the child of the age 18 years. In the normal course, we would have directed that the appellant Jayendra should be sent to an approved school but in view of the fact that he is now nearly 23 years of age, we cannot do

so. 4. For these reasons, though the conviction of the appellant Jayendra has to be upheld, we quash the sentence imposed upon him, and direct that he shall be released forthwith. In so far as the other appellant is concerned, his special leave petition has already been dismissed. Ordered accordingly.'

(6) As per the second proviso to sub-clause (c) of clause (1) of Section 21 of the Children Act, 1960, the appellant in the present case could have been sent to the special school up to the age of 18 years only. The second proviso to clause (c) reads as follows :

'Provided further that the Children Court may, for reasons to be recorded, 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 18 years in the case of a boy or 21 years in the case of a girl.'

(7) Following the law laid down by the Supreme Court, we are of the opinion that the sentence imposed by the learned Addl. Sessions Judge vide his order dated 8th November, 1983 be quashed. The appellant is directed to be released forthwith unless required to be detained in any other case.

(8) In view of the fact that we hold the appellant to be a child when he committed the offence, his conviction for the offence under Section 302 is not to be considered a disqualification as provided u/s 25 of the Children Act.