

Sunil Kumar Vs. State

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Court : Kerala

Decided On : Jun-15-1982

Reported in : 1983CriLJ99

Judge : P. Subramonian Poti, Actg. C.J. and; T. Chandrasekhara Menon, J.

Appellant : Sunil Kumar

Respondent : State

Judgement :

ORDER

1. We have just celebrated the year of the child at the National and International level. This was evidently to focus the attention of the world population on the need to devise and execute measures intended to promote the welfare of the children. Our Constitution obliges the State to provide opportunities and facilities to children to develop in a healthy manner and in conditions of freedom and dignity and also to ensure that childhood and youth are protected against exploitation and against moral and material abandonment. Whatever may be the laws promulgated to secure the interests and welfare of children, ultimately results depend on the spirit with which such legislations are applied. The measure of consciousness of the people of the need for attention to problems concerning children will ultimately determine the success of any measures devised by the legislature of the country towards that end. The Children Act, 1960 was enacted by the Union Legislature as an Act to provide for the care, protection, maintenance, welfare, training, education

and rehabilitation of neglected or delinquent children in the Union Territories. On the lines of the Central Act the Kerala Legislature enacted the Kerala Children Act 3 of 1973 with the same objective and it is the said Act which applies to Kerala. A child as defined means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years and when the term is used with reference to a child sent to a children's home or special school applies to that child during the whole period of the stay, notwithstanding that during the period of such stay the child may pass the above age limit. The Act contemplates the constitution of one or more children's courts for exercising the powers and discharging the duties conferred or imposed on such court under the Act. This is notwithstanding the provisions of the Cr. P.C. Section 27 of the Criminal P. C. provides that any offence not punishable with death or imprisonment for life, committed by any person who, at the date when he appears or is brought before the Court, is under the age of sixteen years, may be tried by the Court of a Chief Judicial Magistrate, or any Court specially empowered under the Children Act, 1960 or any other law for time being in force providing for the treatment, training and rehabilitation of youthful offenders. The Children Act contemplates the constitution of three types of institutions, the Children's Home, Special Schools and Observation Homes. Children dealt with under the Act have been treated broadly under two categories, neglected children and delinquent children. The Act also deals with uncontrollable children, but the provisions in regard to these children are the same as those relating to neglected children. The Children's Home is intended to receive neglected children and that should provide the child not only with accommodation, maintenance and facilities for education but also with facilities for the development of his character and abilities and give him necessary training for protecting himself against moral dangers or exploitation. The Special Schools established under the Act are intended for the reception of delinquent children and that again must not only provide accommodation, maintenance and facilities for education but also with facilities for development of the child's character and abilities and give him necessary training for his reformation. Observation Homes are intended for temporary reception of children during the pendency of any inquiry regarding them under the Children Act, That too should provide the children not only with accommodation, maintenance and facilities for medical examination and treatment

but also with facilities for useful occupation. Even a casual perusal of the scheme of the Act and the provisions relating to these institutions would indicate that Special Schools are intended for delinquent children and Children's Homes are intended for neglected children. Observation Homes are intended for those children against whom inquiries are pending and this is therefore temporary in character. These three institutions are thus conceived for different purposes and naturally in functions also they would not be identical in character.

2. The inquiry by a children's court constituted under the Act in respect of neglected child is for determination whether the court is satisfied that the child is a neglected child and whether it is expedient to deal with him. On satisfaction of this the court may direct the child to be sent to the Children's Home for the period till he ceases to be a child. It can also reduce such period not exceeding 3 years as it deems fit, Instead of making an order directing the reception of the child in the Children's Home it is open to the Children's Court to make an order placing the child under the care of parent, guardian or other such person. In short, when a neglected child is produced before the Children's Court the court acts in the interests of neglected child and directs it to be sent to the Children's Home in order to provide it with proper habitation, and where its physical and moral health will be well looked after. This is a measure purely oriented towards the welfare of the child.

3. In the case of delinquent children the Children's Court is to hold inquiry in accordance with Section 39 which lays down the procedure to be adopted. As far as may be, the procedure laid down in the Cr. P.C. for trial of summons cases has to be adopted. Section 20 of the Children Act deals with orders to be passed regarding delinquent children. Where the court is satisfied that a child has committed an offence it may adopt one of the following four courses : (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 (c) make an order directing the child to be sent to a special school for the period until he ceases to be a child (d) order the child to pay a fine if he is over fourteen years of age and earns money. It is not as if the only course the court should adopt is to send the child to the special school. Even where the

direction is to send the child to the special school that does not amount to any conviction or imposition of sentence. This is an aspect often failed to be noticed and Children's Court and the authorities of the Children's Home and Special School treat the children as if they have been convicted and sentenced. In the scheme of the Children Act there is no scope for conviction of a child. There is no scope for sentencing the child. Sending it to the special school is with a view not to impose any term of imprisonment on the child. When the child is in the special school it is not undergoing any such form of imprisonment. When the child is released from the school it does not and it should not carry any stigma of a conviction, for, there is none. The object with which the special school functions is only to impart education including moral education and also equipping the child to take over the responsibilities of an honest citizen as it grows up to become an adult. If authorities who are concerned with the children, whether they be on the judicial side or on the administrative side, do not imbibe the spirit of the legislation and are not inspired by the message of the Act, the Act is bound to do more harm to the children than good and be a curse more than a blessing to the child population in general.

4. We happened to realise first-hand the conditions under which children are sent to and are maintained at the children's Home at Trivandrum. They undergo a period of stay there contrary to the provisions of the Children Act in letter as well as in spirit. The Acting Chief Justice in the company of Justice T. Chandrasekhara Menon visited the Children's Home on 8-1-1982 at which time 77 children were in the Home, There was evidently no distinction between the children who had been sent to the Observation Home, the children sent to the Children's Home and children sent to the Special School. In other words the 77 children were treated as children in one Institution. No distinction was evident to indicate that there were three institutions contemplated under the Act. The atmosphere under which , the children grow is one where they feel that they are undergoing sentences. Even the court which, has sent them to the Children's Home seems to think, as is evident from the report sent to this Court, that they cannot be released before their terms. It is this that caused us to take up these cases in suo motu revision. We think it worthwhile to delineate the functions of the Children's Court and the approach of the Children's Court dealing with children. We would also like to emphasise the

role the Government has to play in running and maintaining Children's Homes and Special Schools.

5. We have taken up 12 cases in Revision. Not that we are stopping with the 12 cases. In the light of our decision in these cases we are calling upon the authorities of the Balamandir to state the case of all the inmates and report to us so that we may pass appropriate orders. Therefore these 12 cases have been taken as illustrative.

6. The 12 cases before us concern children who are neglected as well as children who are found to be delinquent. They have been treated alike. All of them have been sent to the Children's Home for specified terms as if punishment is being imposed on them, whether they be delinquent children or neglected children. This very approach, as we have already indicated, is erroneous.

7. Before we go into this question further we have to indicate a sorry state of affairs that in this State proudly claiming to be composed of an elite population, no Children's Courts are now functioning despite this Act. Children's Courts have to be constituted. Such courts were constituted in 1979 for a term of 2 years. That term expired in 1981 November. But we are told that no Children's Courts have thereafter been constituted. May be the matter is not considered important enough to receive priority of attention. But we must point out that the duty towards children enjoined by the provisions of the Constitution, some of which have been translated into the obligations under the Act envisage continuity in the constitution of Children's Courts and it would be extremely unfair to ignore this obligation by failing to notify the Children's Courts on the expiry of the term of the existing members. The Children's Courts have to be constituted immediately and we direct that this shall be done within a period of 3 months.

8. Even when the Children's Courts had been constituted and were working they have not been functioning in accordance with the provisions of the Children Act. Going through the cases before us we notice that the orders in those cases disposed of by the Children's Court have been signed by. only one Magistrate, namely, the Chief Judicial Magistrate, who was one among the Magistrates of the court. May be he is the Presiding Magistrate. Even so the proceedings cannot be

under the signature only of one of the Magistrates as if he is the only Magistrate who has voice in the disposal of the case. This is sufficient to vitiate the orders sending these children to the Children's Home.

9. We have already pointed out that the approach to the question of treating delinquent children as if the court is imposing a punishment on them is yet another circumstance which would vitiate the order in the cases dealing with the delinquent, children. As we have said the Children's Courts as well as the Chief Judicial Magistrate have not maintained even the distinction between Children's Home, Special School and Observation Home. In every case where delinquent children have been dealt with they have been sent to the Children's Home and not to Special School,

10. Government evidently noticing that those are different statutory requirements for reception of children in the case of neglected children and the delinquent children has issued notifications evidently to satisfy technically the requirement of there being two separate institutions. We are adverting to the notification S.R. O. No. 1119/78 dated 15-11-1978 notifying Children's Homes and S. R. O. No. 1120/78 notifying Special Schools. The interesting point is that the same building but different portions thereof are notified as Special Schools and Children's Homes. But this distinction is only in the Act. As we did notice this distinction is not being maintained in practice in the Children's Home and more than that the courts which dealt with the matter never kept in view this distinction. We make it clear that the delinquent children being sent to the Children's Home instead of Special School would be unwarranted in law. If a neglected child is sent to a Special School instead of Children's Home, that too would be invalid in law. We are not told that any notification with regard to observation Home is issued by the Government. We naturally assume that children sent to Observation Home are also kept in the Children's Home. These totally vitiate the administration of the Act. This calls for immediate attention by the Government and the authorities.

11. Now we will deal with the 12 cases we have taken up.

12. Of the 12 children whose cases have been considered by us 3 fall within the category of neglected children, namely, Sunil kumar in S. T. 33 of 1980,

Mohammad Salim in S. T. 171 of 1979, and Chandran in S. T. 135 of 1979, the first one before the Children's Court, Trivandrum and the other two before the Chief Judicial Magistrate's Court, Kozhikode. We will take up these 3 cases first.

13. The case of Sunilkumar may be taken as illustrative as to how court deals with neglected children. The Sub-Inspector of Police, Cantonment Police Station submitted a report before the Chief Judicial Magistrate, Trivandrum to the following effect : A. V. Sunilkumar aged 13 was seen wandering about the premises of the Secretariate building at Trivandrum, that if he is allowed to do so he may be got into bad company consequent upon which he may grow up to be a bad character and therefore for social good he had to be taken into custody. It is further said that on questioning him he said that his father was not living with his mother, that his mother is not looking after him, and that on further enquiries the Inspector found that there was none to look after him. He was produced before the court whereupon the court for a Probation Officer's report, remanding the boy referring to him in the order as an accused and directing production on a subsequent day. We find that this is done by the Chief Judicial Magistrate styling herself as the Senior Magistrate. It is seen from the copy of the register of summary trials that ultimately Sunil-kumar was 'convicted' under Section 12 of the Children Act and committed to the Balamandir for two years on the prisoner's plea of 'guilty'. The copy of the Register of Summary Trials shows that it is signed only by the Senior Magistrate and there is nothing On record to show that any Magistrate of the Children's Court had anything to do with the matter at any time Or that he participated in the conviction. The entire procedure is thoroughly vitiated and smacks of unconcern keeping in view the sanctity of the purpose for which a separate treatment to the children is envisaged by the Legislature. It is bad for the following main reasons : Q) The Chief Judicial Magistrate as Senior Magistrate cannot solely act. If others have joined in acting with the Senior Magistrate that must be evident from the record and the orders must be signed by them too. (2) A 'neglected child' can never be 'convicted' and the very 'conviction' is illegal. Consequently commitment of the child to the Children's Home is also illegal. (3) There is no question of pleading 'guilty' and recording of such plea is also incompetent. (4) The anxiety that a court should evince to find the true facts concerning the case of neglect is not reflected in the proceedings. The matter has

been dealt with by the police and by the Court mechanically and without application of the mind.

14. S. T. 171 of 1979 is not a case dealt with by the Children's Court but by the Chief Judicial Magistrate, Kozhikode. The Sub Inspector of Police, Juvenile Wing, Calicut filed the First Information Report before that Court. That report mentions that on 8-11-1979 at 22 hours himself, a Headconstable and a Police Constable while patrolling happened to see 5 children in the Kozhikode Railway Station Road. They were found without guardians, without a permanent place of residence, without means of living and wandering about and begging causing nuisance to the public. It is on this that the case was so taken up and the children produced before court. They were remanded. On 7-12-1979 they were produced again and based merely upon the District Probation Officer's report the petitioner and some others were committed to the Children's Home to be there till they ceased to be children. Evidently there was no application of the mind, no consideration of the question relevant in finding whether the child has to be committed to the Children's Home, whether on the vague report of the Sub-Inspector of Police there was any material warranting the order. In short, as we observed in the earlier case, here too the process was thoroughly mechanical. The order, on the face of it, is illegal and liable to be set aside.

15. The case of Chandran who was the child dealt with in S. T. 135 of 1979 is in no way different. That too is by the Chief Judicial Magistrate, Calicut In the same terms as in the previous case a case seems to have been registered against the children, five in number, for wandering about without any means of livelihood. The petitioner here is the 3rd among those mentioned in the First Information Report. We wonder how a First Information Report is filed in such a case as if a crime has been committed. The filing of First Information Report is quite inappropriate and we would even say quite improper. Whatever that be it is merely on that report that the Magistrate is seen to have acted. He was remanded from time to time and on 6-12-1979 the Chief Judicial Magistrate found that the child was a neglected child and directed his detention in the Children's Home until he ceased to be a child. Here again if only the Magistrate had acted in accordance with the Children's Act he could not have found on the materials available that the child was neglected.

An attempt should be made in every case to ascertain the whereabouts of the parents of the child and to persuade them to take the child to their home. It is only when it could be positively found that the children will not be accepted at their homes that the court should find that the child is neglected. The order sending the child to the Children's Home has to be quashed in this case also.

16. Now we will deal with the cases relating to delinquent children. There are two classes of cases : (1) cases relating to theft and (2) cases relating to Abkari Act. Sulaiman, a child against whom S. T. 19 of 1980 was taken up by the Children's Court, Trivandrum, Sivan, a child against whom S. T. 23 of 1980 was taken up, Surendran, a child against whom S. T. 1 of 1981 was taken up, Mohanan, a child against whom S. T. 38 of 1980 was taken up all by the same Children's Court are those concerned with commission of offences under Section 58 of the Abkari Act. They were said to have been seen to be in possession of some arrack and based on such case of illegal possession of arrack they have been charged. Sulaiman, Sivan, Surendran and Mohanan were all convicted under Section 58 of the Abkari Act finding them guilty and they were all committed to the Balamandir for 2 years. We may once again draw the attention of those entrusted with applying the Kerala Children Act to the provision in Section 20 of the Act. It is that provision which they have to keep in view when they deal with children whether it be the Children's Court or the Magistrate empowered in that behalf. That section operates notwithstanding anything to the contrary contained in any other law for the time being in force. The first among the four enumerated orders that the Children's Court could pass is to allow the child to go home after advice or admonition. Not a single case that we have come across has ever made use of this provision. The second is to direct the child to be released on probation of good conduct placing it under proper care. This again is not seen done. Even in regard to offenders who are adults if they be first offenders and the offences are such that it would be advisable to invoke the provisions of Probation of Offenders Act they would be released on probation. In none of these cases there has been an attempt to give the child the benefit of probation. If the child earns money and if he is over fourteen years of age the court can order to pay fine. In none of these cases it has been found that the child earns money and hence the provision was not invoked. To direct the child to a special school is only one of the four ways of dealing with

the child. It is well to remember that a special school is envisaged in the Act as a school which must provide the child (1) with accommodation which means proper accommodation (2) with maintenance which means it would be properly looked after (3) with education which means there must be a properly run school (4) with facilities for development of the character and ability of the child which means that there should be provision for all round development, physical and moral and (5) necessary training for his reformation which means there should be programmes which would inculcate moral values in the child. Strangely enough the Children's Court, excepting in the case of the child Shaji, has even forgotten the existence of a special school. The courts have directed the children to be sent to the Balamandir Or Children's Home. In the case of Shaji the Judicial First Class Magistrate who dealt with the matter-whether he was competent to do so is yet another question - has directed the child to be committed to the certified school, evidently meaning a special school. The conviction of these children which is not contemplated by law and consequently imposing what is evidently conceived as a sentence are factors sufficient to grossly vitiate the orders remanding the children to the Children's Home. These orders therefore require to be vacated.

17. The other cases are cases of offences of theft against the children. Those are the cases against Anil kumar in C. C. 33 of 1980, Sunny in C.C. 31 of 1981 of the Children's Court, Trivandrum, Raju in C. C. 29 of 1980 of the same court, Jalaluddeen in C. C. 28 of 1980 of the same court and Shall in C. C. 8 and 9 of 1981 of the Judicial First Class Magistrate's Court, Shertallai. In all these cases excepting the case of Sunny and Jalaluddeen others have been convicted by the Court, a course which is not warranted and is illegal. Therefore they ought to be released. In the case of Sunny and Jalaluddeen though it has not been specifically found that the child is convicted the State has charge-sheeted crime cases treating the child as accused, the children have been found guilty and as a consequence the children have been committed to the Balamandir. As we have said earlier commitment to the Balamandir is not warranted by the statute and for that reason the orders in these cases have to be set aside.

18. As a consequence we make the following orders:

(1) We therefore direct that all the 12 children whose cases were taken up by us shall be released from the Balamandir and if any of them be in the special school, from the special school. The Superintendent of the Balamandir will give notice to the parents or guardians of the children asking them to go over to the Balamandir to receive the children. Until the parents or guardians turn up the children shall be retained in the Balamandir.

(2) We direct the Inspector General of Prisons to examine each and every case of the children detained in the Balamandir to consider whether in accordance with what we have said here they are liable to be released. The matter may be reported to this Court whereupon we will pass orders. Whether the parents are willing to take the children may also be ascertained.

(3) It is the duty of the Government, now that the Children Act has been passed, to have continuity in the constitution of Children's Court. Attention of the Government is invited to the immediate need for constituting the Children's Court the term of which had expired in November, 1981.

(4) The attention of Children's Court is drawn to the fact that anyone of the Magistrates acting by himself will not constitute the Children's Court. The decision by the Children's Court has to be taken in the name of the Court and is to be signed by all the Magistrates. The Senior Magistrate alone appearing on record will vitiate an order, as, then it would not be the order of the Children's Court.

(5) Neglected children and delinquent children are two different categories and the Act envisages different treatment for them as already explained.

(6) The orders to be passed in the case of delinquent children are those mentioned in Section 20 of the Children Act. That does not include a conviction. No child can be convicted. In appropriate cases where a child is seen to have committed a petty offence or an offence for the first time the provision to render advice and admonition has necessarily to be invoked, Section 21 specially provides that no delinquent child shall be sentenced to imprisonment.

(7) The order by the court is not to be mechanical but inspired by a spirit of affection to the community of children.

(8) The children have necessarily to be looked after well and the Act obliges the Government to care for their physical, educational and moral needs. The programmes in the Children's Home and special school must be so designed as to achieve this objective.

19. We must record our thanks to the learned Advocate General who was helpful in placing the facts with regard to the cases before us and who, on behalf of the Government, evinced the right attitude in the matter of release of these children.

20. We dispose of the petitions as above.

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