

Jeyakumar Vs. the State

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Court : Chennai

Decided On : Oct-22-1991

Reported in : 1992CriLJ2468

Judge : Padmini Jesuddurai, J.

Appeal No. : Criminal Appeal No. 740 of 1986

Appellant : Jeyakumar

Respondent : The State

Advocate for Def. : S. Prabakaran, Adv. for Public Prosecutor

Advocate for Pet/Ap. : S. Shanmughavelayutham, Adv.

Judgement :

1. This appeal has been preferred by the accused in S.C. 55/85 on the file of the First Additional Assistant Sessions Judge, Tiruchirapalli Division, challenging his conviction for offences under Sections 457 and 380, I.P.C. and the sentence of imprisonment for a period of 7 years for each offence, the sentences to run concurrently.

2. The appellant was tried for the offences under sections 457, 380 and 392, I.P.C. read with 397, I.P.C. on the allegation that on 17-12-1983 he committed theft of a gold chain weighing 7 sovereigns belonging to Ethiraj Ammal from her residence

and on 18-12-1983 at 12.00 midnight he trespassed into her house and at the point of knife, made her part with gold jewels weighing 17 1/2 sovereigns.

3. Facts briefly are as follows :- Ethiraj Ammal (who died before commencement of the trial) was residing alone in Door No. 80, Chunnambukara Street, Tiruchirapalli. P.W. 1 her son, was living in another part of Tiruchirapalli. On intimation on the morning of 19-12-1983, P.W. 1 went to her mother's residence and learnt from her that a gold chain weighing 7 sovereigns kept by her in the bureau was committed theft by the appellant and that on the night 18-12-1983, the appellant and another, entered the house at 12.00 midnight and by use of force, took away from her the remaining jewels she was wearing. P.W. 1 wrote a complaint signed by his mother, which P.W. 7, the Sub-Inspector of Police, Crime Branch, Tiruchirapalli Fort Station, registered as Crime No. 2618/83 for offences under sections 457, 380 and 394, I.P.C. On 20-12-1983, P.W. 7 arrested the appellant and found M.O. 2 gold chain concealed in his banian. The same was seized. The appellant took the police officer to his house and produced M.O. 1 a pair of diamond ear rings, M.O. 4 a pair of gold bangles and M.O. 5 a pair of gold bangles. The same day, P.W. 5 the elder brother of the appellant produced before P.W. 7, M.O. 3 a gold chain weighing about 4 sovereigns. M.Os. 1 to 5 belong to the mother of P.W. 1. After completing investigation, charge sheet was laid against the appellant.

4. During trial, on behalf of the prosecution, P.Ws. 1 to 9 were examined, Exs. P-1 to P-10 marked and M.Os. 1 to 6 produced. The appellant denied having committed any crime and stated that he was employed as a domestic servant in the house of Ethiraj Ammal and that her son used to periodically visit her and pester her for money and since he was a hindrance to them, the case was foisted on him. The learned Assistant Sessions Judge accepted the prosecution case, but held that there was no evidence to show that the appellant had used force on the victim at the time of the occurrence and accordingly acquitted him of the offence under section 392 read with Section 397 I.P.C. and convicted him for the remaining offences and sentenced him as stated earlier. The present appeal challenges the conviction and sentence.

5. Thiru Shanmugavelayutham, learned counsel for the appellant assailed the conviction only on one ground, namely, that the appellant was below 18 at the relevant time and in fact after an enquiry by the learned Magistrate had been found to be so and his case, therefore, was sent to the trial Court for trying him as a juvenile but that when the case came up for the trial, the learned Additional Public Prosecutor had filed a memo that as on that day, the appellant had crossed 18 and was an adult had therefore to be tried only by the Sessions Court, which memo had been wrongly accepted and the appellant, though declared a juvenile was tried and convicted by the Sessions Court and hence the entire trial and conviction are illegal. The learned counsel relied upon certain decisions, which I shall refer to later.

6. Per contra, the learned Public Prosecutor while admitting the correctness of the factual contentions, submitted that the appellant had not raised this plea during trial and could not be heard to put forward this contention at this stage, the same not having been mentioned even in his grounds of appeal filed in this Court and as such, in view of the fact that the appellant himself had submitted to the trial and no prejudice having been proved against him, the conviction ought to be sustained.

7. The short question that arises for consideration is whether in law, the conviction of the appellant by the learned Assistant Sessions Judge can be sustained.

8. Facts are not disputed. The occurrence had taken place on 17-12-1983 and 18-12-1983. The case had initially been registered for offence under Sections 457, 380 and 394, I.P.C. Charge-sheet had also been filed only for the above offences in the Court of the Judicial First Class Magistrate, No. 1, Tiruchirapalli. The case had been taken on file as C.C. 424/84 and copies of records under section 173 had been furnished to the appellant. Charge sheet showed the age of the appellant as 21. The appellant filed an application before the above Court that he was still below 18 and as such the Tamil Nadu Children Act, 1920 (Act IV of 1920) (hereinafter referred to as the Act) which was then in force in Tamil Nadu, would apply to him and he should be tried as a 'Young person' by the Juvenile Court. The learned Magistrate held an enquiry and on 25-8-1984 the appellant was radiologically examined and his age was said to be between 17 and 18. The

certificate issued by the Headmaster of Saraswati Vilas Middle School, on the basis of the entry in the Admission Register showed that the appellant who had studied in that school, was born on 13-5-1966. The learned Magistrate, therefore, fixed the age of the appellant to be below 18 and the case was sent to the Sessions Judge, Tiruchirapalli for trying the appellant as a juvenile. The learned Sessions Judge appears to have made over the case to the Court of the First Additional Assistant Sessions Judge for trying the appellant as a juvenile. However, on the day when the case ultimately came up for trial, the learned Additional Public Prosecutor of that Court, has filed a memo to the effect that as on that day, the appellant had completed 18 and that, therefore, he had to be tried only as an adult accused. The learned Additional Assistant Sessions Judge, accepting the memo has sent the case back to the learned Sessions Judge, with a request to convert it into a Sessions case and thereupon, the case was numbered as S.C. 55/85 and again made over to the first Additional Assistant Sessions Judge for trial. Charges had been framed for offences under sections 457, 380 and 392 read with 397, I.P.C.

9. The above facts will show that the age of the appellant as determined by the learned Magistrate under section 37 of the Act, was that the appellant was below 18. On the basis of the memo filed by the learned Additional Public Prosecutor the trial Court appears to have held that the date relevant for deciding, whether an accused is to be tried as a juvenile or as an adult, is the date when the trial actually commences. Admittedly, the appellant was a juvenile both on the day of the occurrence and on the day he was brought before the learned Magistrate but he had completed 18 on the day when the trial actually commenced, by the trial Court framing charges. The question, therefore, would be whether under the Act, the date relevant for deciding whether an accused is to be tried as a juvenile or as an adult, is the date when he is brought before the Court or whether it is the date of the actual commencement of the trial. A scrutiny of the different provisions of the Act would help us to decide the issue.

10. Section 3(3) of the Act defines a 'Young person' as one who is 14 years of age or upwards and under the age of eighteen years. Part II of the Act deals with the establishment and management of approved schools - senior and junior Section

23 requires the Court on conviction of a person between 12 years and 18 years, if the offence is one punishable with imprisonment, in addition to or in lieu of sentencing him according to law to any other punishment, order that he be sent to a senior approved school. Section 24 specifies the period of detention in the schools to be not less than two years and not more than 5 years but only until the offender attains the age of 21. Section 35(2)(e) of Act permits the State Government to transfer a convicted person over the age of 18, detained in senior approved school, to a Borstal School established under the Tamil Nadu Borstal Schools Act, 1925. Part VI of the Act deals with the constitution of Juvenile Courts to try those covered under the Act.

11. Section 37, which is relevant for us, is as follows :-

'Sec. 37(1). Where a person, whether charged with an offence or not, is brought before any Court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child or young person, the Court shall make due inquiry as to the age of that person and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, but an order or judgment of the Court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the Court, and the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that the person, and where it appears to the Court that the person so brought before it is of the age of eighteen years or upwards, the person shall for the purposes of this Act be deemed not to be a child or young person.

(2) No Court shall in appeal or revision interfere with any presumption or declaration as to age made under sub-section(1).'

Section 38-B prohibits joint trial of a child or young person along with an adult and directs separate trial for each of them.

12. A reading of Section 37 would show that the question whether an accused is a 'young person' or not within the meaning of Section 3(3) of the Act, has to be determined, not with reference to the date of the commission of the offence not

with reference to the date of the actual commencement of the trial but only with reference to the date on which the accused is brought before the Court to be dealt with. When a person is brought before any Court and it appears to the Court that he is either a 'child' or a 'young person', the Court has to make a due enquiry as to the age of that person. It is obvious that the enquiry is to be directed to determine the age of the person on the date when the person is brought before, the Court, unlike in the parallel Acts in other States, wherein it is specifically mentioned, that the age on the date of the occurrence would decide the issue. The Magistrate shall taken evidence and Section 37(1) required the Magistrate on the material placed before him to declare the age of the person so brought before it. The age so declared shall be deemed to be the true age of the person for the purpose of the Act. It is also made clear, that no Court shall in appeal or revision, interfere with any declaration as to age, made under this Section and no order or judgment of the Court, shall be invalidated by the subsequent proof that the age of that person has not been correctly stated to the Court.

13. The learned counsel for the petitioner referred to the decision of the Supreme Court in *Umesh Chandra v. State of Rajasthan*, : [1982]3SCR583 wherein it was held that the relevant date for the applicability of the Rajasthan Children Act (16 of 1970) is the date on which the offence takes place. A perusal of the relevant provisions of the above Act referred in the judgment shows that, that Act itself defines a 'child' as one below the age of 16 at the time when the offence was committed. The Tamil Nadu Act is different.

14. *Jayendra v. State of Uttar Pradesh*, : 1982 CriLJ1000 also referred to by the learned counsel, deals with the Uttar Pradesh Children Act, 1951, wherein also a 'child' has been defined as one under the age of 16 on the date of the commission of the offence. While under the above two Acts, the applicability of the Act depends on the age of the person on the date of the commission of the offence, in the Tamil Nadu Act, we do not find any such provision.

15. On the contrary Section 37 of the Act extracted above, shows that the relevant date is the date when the accused is produced before the Magistrate and it appears to the Magistrate that the accused is either a child or a young person. The

age as on that day has to be determined and declared by the Magistrate. The age so declared by the Magistrate shall be the true age of the person for the purposes of the Act. The Act does not contemplate a change in the situation, depending upon whether or not the accused completes 18 during the pendency of the trial. If on the date when the learned Magistrate determines his age he is found to be either a 'child' or a 'young person', he would continue to be so, until the conclusion of the trial and the sentence to be imposed on him would depend upon the other provisions of the Act. Sec. 3 of the Juvenile Justice Act, 1986 (Act 53 of 1986) which came into force with effect from 2-10-1987 replacing the Tamil Nadu Act, contains a specific provision, that where an enquiry has been initiated against a juvenile and during the course of such inquiry, the juvenile ceases to be such, then notwithstanding anything contained in that Act or any other law for the time being in force, the enquiry may be continued and orders might be made in respect of such person, as if such person had continued to be a juvenile. No doubt, in the Tamil Nadu Act, no such parallel provision is found. But the absence of any such provision would not indicate, that even after the age of the accused has been determined u/S. 37 of the Act to be below 18, there could be any change, merely because at a later stage the accused ceases to be below 18.

16. When, therefore, the learned Judicial First Class Magistrate No. I, Tiruchiapalli held an enquiry u/S. 37(1) of the Act and declared the age of the appellant to be below 18, the appellant could be dealt with only under the provisions of the Act and the memo filed by the learned Public Prosecutor is not in consonance with the provisions of the Act. The subsequent trial of the appellant as adult is illegal and without jurisdiction. The appellant could have been tried only under the Act and could be sentenced only in the manner provided under the Act. The entire trial has now to be struck down, and the conviction and the sentence will have to be set aside. The appellant is now aged 25. If he had been trial under the Act, as he should have been and even if he was sentenced to the full extent permitted by the Act, he would have been sent to a senior approved school to be detained there till the age 21 and after that, shifted to Borstal school, wherein also he could be detained only till the age of 23. Under these circumstances, it is not possible for this court to order a fresh trial under the Act. This Court has no option but to set aside the conviction and sentence and leave the matter at that.

17. In the result, this appeal is allowed, the conviction and the sentence imposed by the trial court are set aside and the bail bond if any, shall stand cancelled.

18. Appeal allowed.

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