

In Re: Anthony Alias Bakthavatsalu

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Court : Chennai

Decided On : Nov-06-1959

Reported in : 1960CriLJ927; AIR 1960 Mad 308

Judge : Ramaswami and; Anantanarayanan, JJ.

Appellant : In Re: Anthony Alias Bakthavatsalu

Judgement :

Anantanarayanan, J.

1. This is an appeal by the accused Anthony alias Bakthavatsalu, a young boy aged about 15 years who has been convicted Under Section 376, IPC and directed to be detained in the Senior Certified School, Chingleput, for a period of three years, by the Court of Juveniles, Egmore, Madras. When this appeal was admitted, our learned brother Somasundaram, J. prepared a Memorandum pointing out that under Rule 7 of the rules framed Under Section 44 of the Madras Children Act, the procedure laid down in the Criminal Procedure Code (Act V of 1898) for the trial of summons cases has to be observed by the Juvenile Court in the trial of all cases, whether summons or warrant cases, but that this provision did not render it clear how precisely the Juvenile Court should proceed to try an offender for an offence exclusively triable by Court of Session, such as the present offence Under Section 376, IPC The learned Judge observed that the procedure to be followed by the Juvenile Court in such a case, was not clear, either from the

provisions of the Madras Children Act, or from the rules framed thereunder.

2. This matter has been now placed before us, along with certain additional grounds upon the same aspect urged by Mr. K. Narayanaswamy for the appellant. Those grounds are, firstly, that the Juvenile Court was in error in exercising a jurisdiction at all in this case, because this is a contravention of Section 29 (B), Cr.PC; secondly, that the Juvenile Court ought not to have followed the procedure laid down for the trial of summons cases, with regard to an offence exclusively triable by the Court of Sessions; and, thirdly, that the mode of trial and the sentence itself under the Madras Children Act (Act IV of 1920), contravened Article 14 of the Constitution of India.

3. In view of the importance of these grounds, we have heard the learned Advocate General and the learned Public Prosecutor upon these objections, as well as the learned Counsel for the appellant. We shall deal with this matter first, before proceeding into the merits of the conviction.

4. The ground of objection concerning the procedure to be followed, which is also the ground referred to in the Memorandum of Somasundaram, J, drawn up at the time of the admission of this Criminal Appeal, may be first disposed of. It has to be noted that, Under Section 4 (v). Cr.PC. ' 'summons case' means a case relating to an offence, and not being a 'warrant case" and that Under Section 4 (W)

warrant case' means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding one year.

The result of this is that, as the learned Advocate General contends, from the point of view of classification of cases for the purposes of the Criminal Procedure Code, every conceivable criminal case is either 'a summons case' or a 'warrant case'. There is no third category. The further consequence is that all cases exclusively triable by the Court of Session are 'warrant cases', as cases in which the offences are punishable with imprisonment for a term exceeding one year. Even an offence punishable Under Section 302, IPC has thus to be technically classified as a warrant case. When we look at the scheme of the Code, we find that Sections 241 to 250 (Chapter XX) relate to trial of summons cases by Magistrates.

Sections 251 to 259 (Chapter XXI) relate to trial of warrant cases by Magistrates, Chapter XXII relates to summary trials. Chapter XXIII (Ss. 266 to 336) relates to trials before High Courts and Courts of Session. This part of the provisions of the Code concerns, according to the learned Advocate-General, a curial procedure, and not a third classification of cases. We accept this argument, which is in conformity with the definitions we have set forth earlier, and the scheme of these chapters,. Consequently, the procedure laid down in the Madras Children Act (Act IV of 1920) as applicable to all cases triable by a Juvenile Court, including offences exclusively triable by a Court of Session according¹ to Schedule 2 of the Criminal Procedure Code, will be the procedure governing a case like the present also. As, under the rules framed Under Section 44 of the Madra., Children Act, that procedure is identical with the procedure to be adopted for the trial of summons cases, this case was properly tried by the Juvenile Court in conformity with those rules,

5. The more important question is whether the Juvenile Court could try such an offence at all, which is exclusively triable by tile Court of Session according to Schedule 2 and the general scheme of the Code of Criminal Procedure. In this context, fl learned Counsel for the appellant draws our attention to Section 29-B of the Code of Criminal Procedure, which is in the following terms :

Any offence, other than one 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 fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate, or by any Magistrate specially empowered by the State Government to exercise the powers conferred by Section 8, Sub-section (1), of the Reformatory Schools Act, 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby.

6. The argument of learned Counsel (Mr. K. Narayanaswamy) is that Sectin 29-B was enacted when the Reformatory Schools Act, 1897, was being replaced by other legislation such as the Madras Children Act or similar measures, or when

such superseding laws were in contemplation. He states that, in consequence the Central Legislature laid it down that all such enactments shall operate only within this restricted scope, namely, that juvenile offenders may be tried by such special Courts or Magistrates for any offence 'other than one punishable with death or imprisonment for life'. Those words have to be read disjunctively, and the implication is that no Juvenile Court, nor Special Magistrate, can try a juvenile for an offence punishable with imprisonment for life, such as an offence of rape. The Juvenile Court had, therefore, no jurisdiction in this case. Learned Counsel also refers to a decision of a Bench of the Calcutta High Court in *Lakhi Sahu v. Emperor* : AIR1932 Cal487 , where with reference to an offence punishable Under Section 304, IPC it was held that Section 29-B took away the jurisdiction of a specially empowered Magistrate to try a juvenile offender.

7. The learned Advocate-General has addressed arguments upon this aspect, and drawn our attention, in particular, to Section 1, Sub-clause 2, Cr.PC. Section 6, Cr.PC and to the provisions of the Government of India Act, 1919 (9 and 10 Geo. 5) and the schedules thereto, which originally governed the power of a State Legislature to enact a measure like the Madras Children Act (Act IV of 1920). It is important to note that Under Section 1 (2), Cr.PC. nothing in the Criminal Procedure Code

shall affect any special or local law now in force, or any special jurisdiction or power conferred; or any special form of procedure prescribed, by any other law for the time being in force.

Similarly Under Section 6. Cr.PC. :

Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be live classes of Criminal Courts in India...

8. This juxtaposition of Section 1(2) Cr.PC, and Section 6, Cr.PC, taken along with the Government of India Act, 1919, and the schedules thereto, clearly imply that the State Legislature had power to make a law for establishing Juvenile Courts to try all juveniles, accused of any offence whatsoever. Hence, Section 29-B does

not take away the power of the State Legislature to enact a measure like the Madras Children Act (Act IV of 1920). The power of the Juvenile Court to try all juvenile offenders for any offence, including murder, is therefore incontrovertible. The learned Advocate General has sought to further sustain this argument upon the authority of *Lakhi Narayan Das v. Province of Bihar* 1949 FCR 693 : A.I.R. 1950 FC 59. The learned Judges observed therein :

The Concurrent List is not a forbidden field to the Provincial Legislature, and the mere fact that the Provincial Legislature has legislated on any matter in the Concurrent List is not enough to attract the mischief of Section 107 of the Government of India Act.Section 1(2) of the Criminal Procedure Code expressly lays down that the provisions of the Code would not affect any special form of procedure prescribed by any law for the time being in force

9. We accept the argument of the learned Advocate General that, upon the grounds set forth already, it was competent for the State Legislature to enact the provisions of the Madras Children Act (Act IV of 1920). and that, having regard to the juxtaposition of Section 1(2). Cr.PC. and Section 6 Cr.PC. Section 29-B. Cr.PC, does not, by any necessary implication, take away the power of a Juvenile Court established by law to try a juvenile offender even for an offence punishable with death for imprisonment for life.

10. The ground relating to Article 14 of the Constitution might be immediately disposed of, as it seems to have very little substance. There is ample authority for the view, which we need not reiterate and support by extensive citations of the case law here, that in construing Article 14, a classification which rests upon reasonable ground of distinction must not be impugned as subversive of equality before the law. It is sufficient to refer to *Charanjilal v. Union of India* : [1950]1SCR869 and *State of Bombay v. F. N. Balasara* A.I.R. 195 L SC 318. The distinction here is for the benefit of the juvenile, and eminently reasonable, as the distinction enables a more informal procedure, and far more humane methods of dealing with crimes committed by juvenile offenders. This ground must, therefore, be rejected

11. We shall now proceed to the merits of the case.

12. The offence related to the rape, by this appellant, of a young girl Paulin (P.W. 1) aged about 7 1/2 years and the daughter of Joseph (P.W. 2), a butler by avocation. The girl (P.W. 1) herself has given very clear and straightforward evidence, that the appellant raped her, and that she did not tell her mother then, as she was afraid that her mother would beat her. That night she had great pain, and her father (P.W. 2) took her out for easing herself, at her request, and then noticed her abdomen and private parts, and questioned her, when the girl informed him of the offence, There has been some comment upon the delay in this case, but it is perfectly explicable and natural. The girl herself (P.W. 1) did not speak to the facts till nightfall. Joseph (P.W. 2) state that, as it was late in the night he took no action that night. The next afternoon he took P.W. 11 to Nungambakan Police Station and preferred a-complaint. When, we bear in mind the considerable reluctance of parents in Indian society, to complain about or even to divulge an act of defilement of a daughter of tender years, the delay can hardly be termed suspicious or unnatural.

13. The medical evidence shows that the girl (P.W. 1) had lacerations over the edges of the hymen, which was also tender, though the membrane had not been ruptured. This is further in conformity with the examination of the accused by Dr. Chandrasekaran (P.W. 3). Smegma was present in the organ of the accused, and P.W. 3 states that this indicated that 'the accused could not have had complete sexual connection'. There can be no doubt, therefore, that the incident of rape really occurred,

14. Learned Counsel for the appellant has advanced an argument that the facts may not amount to the completed offence of rape, but only to an attempt at rape, and that the conviction Under Section 376 IPC is therefore not sustainable. We have carefully considered the facts of evidence, and we are quite unable to agree. On the contrary, we are definitely of the view that the Bench of the Juvenile Court came to the correct conclusion here, even though it might superficially appear as if only an attempt at rape was involved upon the facts. The explanation to Section 376 IPC is very clear. The authorities have uniformly laid it down that, while there must be penetration in the technical sense, the slightest penetration would be sufficient, and a completed act of sexual intercourse is not at all necessary. As

observed in Gour's 'The Penal Law of India' 6th Edition (1955) Vol. II. P. 1678: 'Even vulvae penetration has been held to be sufficient for a conviction for rape'. In the present case, there was certainly penetration, as the medical evidence shows, though it was slight.

15. The accused was properly convicted, and we consider that the direction for detention made by the Juvenile Court was the most appropriate sentence under the circumstances of the case. Both the conviction and sentence are confirmed and this Criminal Appeal is dismissed.

16. We finally wish to express our indebtedness to the informed and lucid arguments of the learned Advocate General lighting up the dim regions arising from recent amendments.

Ramaswami, J.

17. I entirely agree. I wish to add the following observations regarding four points pressed by the learned Advocate Mr. K. Narayanaswami Mudaliar. I have discussed them in detail in *Public Prosecutor v. Arumugam*, Pillai A.I.R. 1958 N. U. C. (Mad) 4329.

18. (i) The depth of penetration is immaterial, in so far as the offence Under Section 376 IPC is concerned: *Ghanshyam Misra v. The State* : AIR1957 Ori78 . Similarly in the United Kingdom for rape to be constituted, there must be proof of penetration although very slight penetration is sufficient; and the completion of the sexual act need not have occurred: Sexual Offences Act, 1959, Section 44; *R. v. Cox*, (1832) 1 Law. 292.

19. (ii) The learned advocate asked us to look for corroboration of the evidence of the victim, on the ground that rape has often been described as the easiest charge to make and the most difficult to refute: *Karichiappa Goundan*, In re A.I.R. 1942 Mad 285. This question of corroboration has been the subject matter of a decision of the Supreme Court in *Rameshwar Kalyan Singh v. State of Rajasthan*. : 1952 CriLJ547 . In that case the appellant was charged with committing rape on a young girl, eight years of age. The learned Sessions Judge held that the evidence

was sufficient for moral conviction but fell short of legal proof because, in his opinion, the law requires corroboration of the story of the prosecutrix connecting the appellant with the crime. He was satisfied, however, that the girl had been raped by somebody.

Accordingly he acquitted the accused. In the appeal by the State against acquittal the High -Court held that the law requires corroboration in such cases but held that the girl's statement made 'to her mother was sufficient corroboration and .setting aside the acquittal convicted the appellant. On appeal to the Supreme Court it was held: The first question is whether the law requires corroboration in these cases. The Evidence Act nowhere says so. A woman who has been raped is not an accomplice. If she was ravished, she is the victim of the outrage. In the case of a girl below the age of consent, her consent will not another. The learned High Court Judges were) wrong in thinking that they could not, as a matter of law, convict without corroboration. The tender years of the child, coupled with other circumstances appearing in the case, such, for example, absence of motive to falsely implicate the accused its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case.

In this case no corroboration beyond the statement of the child to her mother was necessary. The appeal was dismissed. How the principles laid -down in the Supreme Court decision should be applied are set out in Public Prosecutor v Mohan Sankara Das, 1956 AWR 572 and State Govt. of M. P. v. Sheodayal Gurudayal A.I.R. 1956 Nag 8; Duliehand v. State . See also In re B. Chinnappa, : AIR1951 Mad760 . How tell-tale smegma on the person of the accused will also corroborate the prosecutrix see: Ramkala Prasad v. Emperor : AIR1948 All191 ; Harendra Prosad v. Emperor : AIR1940 Cal461 .

20. (iii) Thirdly, the learned advocate stressed the absence of any external marks showing resistance as negating rape. The victim in this case was a girl of tender years and the assault was by .a fully grown up boy. It will be fatuous to expect unmarks of resistance in such a case.

21. In fact even in the case of adults it has been held in Rao Harnarain Singh v. State that a mere act of Tielpless resignation in the face of inevitable compulsion,

quiescence, non-resistance, passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. Submission of her body under the influence of fear or terror is no consent.

There is a difference between submission and consent. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl, in order to relieve an act of criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing power and capacity to withdraw the assent according to one's will or pleasure. A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

Our courts have even gone to the extent that even consent after the first act of rape does not absolve the accused, as it might purely be the result of sexual urge and would not affect the first act of coitus which has already taken place against her will. Therefore, as pointed out by Dr. Kenny in his *Outlines of Criminal Law*, 17th Edition (1958), although the offence of rape is usually effected by violence it has been decided that rape can be committed without the use of any violence, the essential point being that the woman's free conscious permission has not been obtained in the case of adults and in the case of girls below the age prescribed in the Sexual Offences Act, 1956, consent is no defence and resistance need not be looked for.

22. Finally I agree with my learned brother, that on account of the stigma which gets attached after the commission of the offence of rape and which would

seriously jeopardise the chances of getting married in decent circumstances, the victims and their relatives are often thoroughly unwilling; to come forward promptly with reports of the offences. In fact it requires a lot of probing and persuasion by the Police Officers for the affected parties to disclose the details of the commission of the offence. That is why in assessing the infirmities attached to delay in preferring a first information report due regard must be paid to the manners, customs and the mode of life of women and girls in this country which are very different, for instance, from those in England, and therefore a delay which may be considered sinister in England might get very legitimately explained in these parts.

A.I.R. 1955 N. U. C. (Mad) 4329

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