

Present :- Hon'ble Mr. Justice I. P. Mukerji
Hon'ble Mr. Justice Biswaroop Chowdhury

**Shubham Surana
Vs.
State of West Bengal & Anr**

**For the State : Mr. Sandipan Ganguly, Sr. Adv.
Mr. Bibaswan Bhattacharya.**

Judgment on : 16.01.2023.

This judgment is a work of collaboration between my brother Mr. Justice Biswaroop Chowdhury and myself.

These applications under Section 482 of the Criminal Procedure Code were heard out, dispensing with all formalities. As common questions of fact and law are concerned they are disposed of by this composite judgment and order.

The preamble to the Juvenile Justice (Care and Protection of Children) Act, 2000 (the 2000 Act) made it explicit that it was being enacted to consolidate and amend the law relating to juveniles in conflict with law. It was repealed and replaced by the Juvenile Justice (Care and Protection of Children) Act, 2015 (the 2015 Act) on 15th January, 2016.

Both the 2000 and the 2015 Acts have a non-obstantive clause. Section 1(4) in each clarifies that irrespective of any provision in any other Act, the

Act will apply to all matters covered by it inter alia concerning children in conflict with law.

In the Act of 2000, “juvenile” or “child” is defined in Section 2(k) and “juvenile in conflict with law” is defined in Section 2(l) as follows:-

“2. (k) “juvenile” or “child” means a person who has not completed eighteenth year of age.

(l) “juvenile in conflict with law” means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.”

There is no change in the definition of “juvenile” in Section 2(35) of the 2015 Act.

However, in the 2015 Act, “child” and “juvenile” are defined separately as follows:-

“2. (12) “child” means a person who has not completed eighteen years of age.”

2. (35) “Juvenile” means a child below the age of eighteen years.”

“Child in conflict with law” is defined in Section 2(13) of the 2015 Act as follows:-

“2. (13) “child in conflict with law” means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.”

The definition of “juvenile” or “child” in Section 2(k) of the 2000 Act and of “child” in Section 2(12) of the 2015 Act and “juvenile in conflict with law” in Section 2(l) of the 2000 Act and Section 2(13) of the 2015 Act are identical.

A child would be in conflict with law if he is alleged to have committed an offence below the age of 18 years on the date of commission of such offence.

Our constitutional principle enumerated in Article 20(1) is that a person can be charged, tried and convicted for an alleged offence on the date of

its commission and not for an act which was not an offence on such date but recognized as an offence at a later point of time by amendment of a statute or enactment of a new statute.

Say for example, an offence is committed by A when he is 17 years and 11 months old. The offence is discovered by the police, enquired into and tried after A has completed 18 years of age. Although at the time of discovery of the offence A has completed 18 years of age, he would be tried under the Act in force on the date of commission of the offence.

Section 9(2) of the 2015 Act recognizes this principle. When a person claims before a court that he was a child on the date of commission of the offence, the court would make an enquiry and determine the age of the person on the date of the alleged commission of the offence. The proviso to the sub-section makes it abundantly clear that this claim can be made and adjudicated upon at any stage of the proceedings.

Parliament has also provided in Sections 5 & 6 of the 2015 Act that once a procedure under the 2015 Act has begun, while the accused was a juvenile, the same procedure would apply, if later he ceased to be so.

A most extraordinary situation has arisen in this case.

It is undisputed that the petitioner was a juvenile on the date the alleged offences described in detail in the charge sheets were committed. Nonetheless in them there are references to several cases started by the police stations after the petitioner ceased to be a juvenile. The particulars of such offences and the dates of their alleged commission are unavailable in the charge sheets. It is not evident whether some of them were committed after the accused ceased to be a juvenile or child.

Mr. Bandyopadhyay, learned Senior Advocate for the petitioner submits that the alleged offences were committed when the petitioner was a juvenile. Instead of proceeding under the procedure prescribed by the said Act the prosecution is prosecuting him under the ordinary law. Therefore, the whole prosecution is a nullity in the eye of law.

On the other hand, Mr. Ganguly, learned counsel submits that the offences were continuing in nature and even if they had commenced when the petitioner was a juvenile they continued when he ceased to be so. The Act provided for safeguards when a juvenile accused was being prosecuted. Here the petitioner/accused had crossed that age. Therefore, prosecution under the ordinary law was justified.

Suppose an offence is continuous and part of it is committed by a person when he is a juvenile and the rest of it when he ceases to be so, is the accused to be prosecuted under the said Act or under the ordinary law?

The birth certificate of the petitioner as annexed to the petition shows his date of birth as 2nd October, 2001. In the charge sheets the same date of birth is reflected, which shows that the prosecuting agency accepted this date of birth. In any case, even before us no dispute has been raised by the prosecution with regard to the petitioner's date of birth. Even in the complaint petition (see page 49 of the application CRR 4397 of 2022) the complainant says that the case was started in 2013.

If you read the charge sheets *prima facie* the alleged offences seem to have been committed when the petitioner was a juvenile. The petitioner continued to be so, till much later.

Although the charge sheets do not explicitly say so Mr. Ganguly submits before the court that the charge sheets would also reveal that the alleged offences continued after the petitioner ceased to be a juvenile.

Now, if the petitioner was a juvenile at the time of the alleged commission of the offence he could not have been arrested, under Section 10(1) of the said Acts. Neither could he have been placed in a police lock up or locked in a jail. The Juvenile Justice Board constituted in a District would have exclusive power to deal with a juvenile in conflict with law.

Here, a situation has arisen which perhaps was not contemplated by the legislature while enacting the said Act.

On my reading and interpretation of the said Act there is no provision which takes care of this peculiar situation of prosecution of an offender

for having committed an offence while he was a juvenile and which offence continued when he ceased to be a juvenile. If it is one continuing offence you cannot break up one offence into two, one having been committed whilst a person was a juvenile and the other when he ceased to be juvenile. Try one under the said Act and the other under the ordinary law. It would be trying the same offence twice through different substantive law and procedures. It would be a case of double jeopardy and unsustainable in law (see Article 20(2) of the Constitution).

If the offences are two distinct offences then the one committed during the period a person was juvenile can be segregated from one committed thereafter.

Suppose the offence is committed whilst the accused was a juvenile and he ceased to be a juvenile thereafter. If that be the case, the intention of the legislature was that both substantive and procedural rights vested in him could not be taken away by the advancement of his age from juvenile to non-juvenile. The procedure for investigation, conduct of the trial and the award of punishment would be according to the law which was applicable when he was a juvenile.

In continuing offences, where one part is committed while the accused is a juvenile and the other part when he was not, the situation is different.

A continuing offence has to be taken as a chain of facts constituting an offence. In such a case, would the accused be treated under the special law governing juveniles or under the ordinary law? The answer is not easy. In the end parliament has to take a decision on the point. We can only make a few observations.

What a judicial mind has to consider is that in enacting this special law the legislature has taken into account the fact that a child or juvenile or a person below 18 years of age may be led astray by his friends and companions or by his failure to consider the realities, or what is right and wrong. The environment in which a child grows up might also have a

role to play. In such a situation the law shows leniency to him for his age. The law also considers the fact that at such a tender age a child or juvenile may not be able to have the required intention or mens rea as adults would have to commit a crime.

Giving a purposive interpretation to the words of the statute if a small part of the continuing offence which is incidental or a small component of the actus reus is committed after the person ceased to be a juvenile then he would continue to enjoy the protection of the Juvenile Act for the reason that the mens rea for committing the offence during the post juvenile period was minimal compared to the mens rea for the prior period.

If on the other hand, the substantial portion of the offence continues after a juvenile ceased to be so, then certainly the mens rea for committing the offence was substantial during the period he ceased to be so. In this case, the offence continuing after the juvenile ceased to be so would be counted as a substantive offence. The part of it committed before ceasing to be juvenile would be deemed to have fused into the part, committed after ceasing to be so. In that case he ought to be tried under the ordinary law and all proceedings which had started against him under the Juvenile Act would be converted into one under the ordinary law and proceeded with.

However, if the offences can be segregated into one committed whilst a juvenile and other ceasing to be one, then separate trials can be held.

Upon considering the provisions contained in Section 5, and section 9 of the 2015 Act and the facts of the case, we dispose of these applications, by issuing directions upon the learned court below where these proceedings against the petitioner are pending, to decide the issue as to whether the petitioner was a child at the time of commission of the alleged offence.

We grant liberty to the petitioner to surrender before the learned court within a period of three weeks from date together with an appropriate

application making a claim of being a child during the alleged commission of the offences. In the event such an application is made by the petitioner, the learned court shall consider and decide the same in accordance with the provisions contained in Sub-Section – 2 and Sub-Section – 3 of Section 9 of the 2015 Act, considering our above observations.

During the course of this inquiry and determination under Section 9 of the 2015 Act whether the petitioner was a child at the time of the alleged offences, the learned court may either decide to keep the petitioner in protective custody or may grant him bail on such terms and conditions as it may think fit and proper. In the event the learned court decides to keep the petitioner in protective custody the petitioner shall be placed in a place of safety as defined under Section 2(46) of the 2015 Act. It is however made clear that the warrant of arrest issued against the petitioner shall remain stayed for a period of 3 weeks. In the event the petitioner fails to appear within three weeks, learned court will be empowered to execute the warrant to ensure his appearance.

The investigating authorities shall, till the above determination is made by the Board, deal with the petitioner according to the 2015 Act.

Each of the Criminal Revision Applications is disposed of accordingly.

Urgent certified photo copy of this judgment and order, if applied for, be furnished to the appearing parties on priority basis upon compliance of necessary formalities.

I agree.

(Biswaroop Chowdhury, J.)

(I. P. Mukerji, J.)