

(1987) 02 CAL CK 0001**Calcutta High Court****Case No:** None

Pradip Ghosh

APPELLANT

Vs

The State

RESPONDENT

Date of Decision: Feb. 25, 1987**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 307, 342, 354
- WEST BENGAL CHILDREN ACT, 1959 - Section 24, 25, 26

Citation: (1988) CriLJ 366**Hon'ble Judges:** Sudhanshu Sekhar Ganguly, J; Jitendra Nath Chaudhuri, J**Bench:** Division Bench**Judgement**

Jitendra Nath Chaudhuri, J.

This criminal appeal No. 319 of 1978 arises out of Sessions Trial No. 5(3) of 1978 held by the learned Addl. District and Sessions Judge Cooch Behar. In the said trial the present appellant Pradip Ghose alias Khaju was convicted u/s 307 I.P.C. and sentenced to R.I. for seven years. He was also convicted u/s 354 I.P.C. and sentenced to R.I. for six months. Both the sentences were to run concurrently. He was also convicted u/s 342 I.P.C. but no separate sentence was imposed. The said offences were committed by the appellant on 18-9-76.

2. At the hearing of this appeal on 15-5- 86 this Court, in view of the submissions made by Mr. Somraj Dutt, the learned Advocate for the appellant and Mr. S. Mukherjee, learned P.P., this Court remitted the following issue for determination to the learned Session Judge, Cooch Behar:

What was the age of the accused-appellant Pradip Ghose alias Khaju on 18-9-76.

The learned Session Judge was asked to certify his finding after giving an opportunity to both sides to lead oral and documentary evidence, if any, and after hearing their submissions, if any on the said issue. The learned Sessions; Judge was

further given liberty to send the accused to the Chief Medical Officer, Cooch Behar, for ascertainment of the age of the accused.

3. The learned Sessions Judge by his order dt. 28-11-86 forwarded to this Court, has after holding the necessary enquiry, clearly found that the age of the accused as on 2-9-85 would be about 25 years. The alleged date of occurrence being 18-9-76 the appellant was obviously well below the age of 18 years on 19-9-76. The text of the said order dt. 28-11-85 of the learned Sessions Judge is set out herein below:

Accused Pradip Kr. Ghosh Khaju on bail is present. Ld. lawyer of the accd. person as well as the Ld. P. P. are present. Prosecution files hajira of the Radiologist Dr. S. K. Dutta.

Dr. S.K. Dutta is examined in chief by the Ld. P. P. as P.W. 1 who proves the "X-ray" plates, marked as Mat. Exbt. I (collectively).

His cross-examination is declined by the Ld. lawyer of the defence and he is discharged.

Pursuant to the Hon"ble Court's order, the accd. Pradip Ghosh was forwarded to the Radiologist, M.O.N., Hospital, Cooch Behar, for his ossification test to ascertain his age. Dr. S. K. Dutta, the Radiologist, examined the accd. on 2nd Sept. 1986 and he also identified the accd. Pradip Ghose in Court. From the evidence of the Radiologist it is clear that the present age of the accd. is above 25 years. The Ld. Public Prosecutor appearing for the State has in his usual fairness submitted that there is nothing in the evidence of the radiologist (P.W. 1) to controvert his opinion that the present age of the accd as on 2nd Sept. 1986, would be about 25 years. No other evidence has been led with regard to the age of the accused. Having - regard to the evidence of P.W. 1 I am of the view that the age of the accd. as found by the radiologist would be about 25 years on 2nd Sept. 1986 which is the date of examination of the accd. by the radiologist. In the present case, the occurrence took place in Sept. 1976 i.e. about 10 years, back. Accordingly, the age of the accd. as on the date of occurrence would be much below 18 years and as such he must be found to be a "Child" within the meaning of the term as defined in the West Bengal Children Act, 1959. Accordingly, I hold that the accd. was a child and his case is to be governed by the West Bengal Children Act, 1959. Let the aforesaid finding along with the record of the case be forwarded to the Hon"ble High Court at the earliest, the evidence of the radiologist along with the X-ray plates, material Ext. I, be also forwarded to the Hon"ble High Court for Hon"ble Court's perusal and consideration.

Sd/-, P. P. Sarkar,

Sessions Judge, Cooch Behar.

4. We accept the findings of the learned Sessions Judge as embodied in his order dt. 23-11-86. The result is that the appellant on the relevant date, namely, 18-9-76 was a

juvenile. u/s 25 of the West Bengal Children Act, 1959 (West Bengal Act XXX) an enquiry should have been held against him as provided in Section 25 of the Act and unless the case of the appellant falls within the proviso to Section 24(2) of the said Act, he could not be sentenced to suffer imprisonment. Therefore, the entire trial of the appellant was without jurisdiction and is vitiated. Therefore, the conviction of the appellant for having committed the offence charged u/s 307, 354 and 342 I.P.C. and the sentence of R.I. for seven years and R.I. for six months Under Sections 307 and 354 respectively are unsustainable and they must be set aside.

5. The appeal for the reason indicated above is allowed, and the conviction of the appellant for the offence u/s 307, 354 and 342 I.P.C. and the sentence of imprisonment imposed on him by the learned Addl. District and Session Judge, Cooch Behar in Sessions Trial No. 5(8) of 1975 are set aside. We remit the case to the learned Sessions Judge, Cooch Behar. In the event of there being a juvenile court in the area the learned Sessions Judge will forward the case to the said juvenile court for disposal in accordance with law. If there is no juvenile court in the area, the learned Sessions Judge himself or any learned Addl. Sessions Judge of the same Session Division to whom the case may be assigned by him will dispose of the case in accordance with law. The Court disposing of this case in accordance with law will particularly bear in mind the provisions of Sections 24, 25 and 26 of the West Bengal Children Act, 1959.

6. We make it clear, that in allowing this appeal we have not gone into the merits of this appeal and this appeal has been allowed because of the lack of jurisdiction of the learned Sessions Court which tried the appellant in Sessions Trial No. 5(2) of 1979 and in doing so we have been guided by the decision of the Hon"ble Supreme Court reported in [Gopinath Ghosh Vs. The State of West Bengal](#) .

7. We direct that the case which is being : remitted, be disposed of in accordance with law as expeditiously as possible. Let the records be sent down immediately.

Sudhanshu Sekhar Ganguly, J.

8. I agree.