(2002) 06 CAL CK 0028

Calcutta High Court

Case No: Cr.R. No. 2654 of 1998

Raj Ambarish Sen alias Ambarish Sen		APPELLANT
	Vs	
The State of West Bengal		RESPONDENT

Date of Decision: June 17, 2002

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 306, 307, 308, 401, 482
- Evidence Act, 1872 - Section 118
- Juvenile Justice Act, 1986 - Section 18, 19, 2, 2(g), 20, 20
- Penal Code, 1860 (IPC) - Section 34

Citation: (2003) CriLJ 3830 : 107 CWN 310

Hon'ble Judges: Malay Kumar Basu, J

Bench: Single Bench

Advocate: Sekhar Basu and Debashis Roy, for the Appellant;Sudipta Moitra, Krishna Ghose and Rana Mukherjee, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Malay Kumar Basu, J.
This Revisional Application is directed against the order dt. 19-9-1998 passed by the ld. Additional Sessions Judge, 11th Court, Alipur in S. T. No. 2 (8) of 1998 (Sessions Case No. (2) of 1998) which arose out of Gariahat P.S. case No. 176 dt. 20th July, 1996 u/s 302/34 of the IPC whereunder ld. Judge allowed an application u/s 307 of the Cr. P.C. filed by one Panchami Palta, die mother of the O.P. No. 1, Khokan Palta who was one of the accused persons of the said case.

2. The relevant facts may, be summarised as follows. The petitioner Raj Ambarish Sen along with the O.P. No. 1 was arrested in connection with the abovementioned

sessions case by police on 17th November, 1997 and subsequently on completion of investigation police submitted a charge-sheet against him u/s 302/34 IPC before the Ld. SDJM, Alipur who took cognizance of the offence and after observing the formalities committed the accused Raj Ambarish, to the Court of Session. In August, 1998 the ld. Addl. Sessions Judge framed charge against the petitioner u/s 302/34 IPC when the petitioner pleaded not guilty and thereafter the case was fixed for trial. It is to be noted that the O.P. No. 1 Khokan Palta, was found to be juvenile at the time when the alleged incident took place and hence his case was split up and was sent to the ld. Magistrate-in-Charge of the Juvenile Court for disposal in accordance with the law while the petitioner, Raj Ambarish Sen, continued to face his trial at the said Court of Addl. Sessions Judge. Thereafter while the case as against the O.P. No. 2 Khokan Palta was pending before the Court of Ld. Magistrate-in-Charge of Juvenile Court, an application was preferred by Sm. Panchami Palta, the mother of the said accused Khokan Palta, in terms of the sections 306-307 of the Cr. P. C. on behalf of her son praying for pardon and an order treating him as an approver and witness on behalf of the prosecution. Since the Ld. Magistrate was not competent to hear such an application, it was transmitted to the Court of Ld. Addl. Sessions Judge for disposal. Having come to know about such application the petitioner filed a written objection there against challenging its maintainability in law, Thereafter the Ld. Judge after hearing ld. counsel allowed this application by passing the impugned order dt. 19-9-1998. This order according to the revisional applicant suffers from illegality, impropriety and incorrectness and, therefore, should be set aside.

3. It has been contended on behalf of the petitioner that the impugned order is a glaring example of the abuse of the process of Court and it would cause great miscarriage of justice in holding the O. P. No. 2 Khokan Palta as a co-accused accomplice of the petitioner on the basis of his statement recorded u/s 164 of the Cr. P.C., inasmuch such a statement cannot be treated as a confessional statement its contents being totally exculpatory. It is his further case that even if it is assumed for, the sake of argument that the mother of the accused Khokan Palta had the authority to make such an application on behalf of her son since the provisions of Section 306 or 307 Cr. P.C. are applied to a person who has not been committed to the Court of Session, nor he was being tried by that Court along with the petitioners, the Court of session had no jurisdiction to pass such order granting pardon and in such circumstances the application filed by the mother of that O.P. No. 2 Khokan Palta u/s 306/ 307 of the Code will be bad in law, thus, by passing the impugned order allowing the petition u/s 306/307 Cr. P.C., Ld. Judge has committed serious miscarriage of justice and the same is liable to be set aside.

4. Mr. Basu, Ld. Advocate for the revisional applicant has emphatically argued that under the Juvenile Justice Act by the provisions of which the concerned accused Khokan Palta, is to be governed there (s no scope for tendering pardon or exercising the discretion as enjoined u/s 306 or 307 of the Cr. P.C, Because under that Act the

whole concept of measures for dealing with the juvenile is reformative and not punitive and the essential pre-conditions of these sections of the Code are remaining unfulfilled and in that view of the matter the question of applying these provisions of the Code and granting pardon cannot arise. According to Mr. Basu the said provisions of the Cr. P.C. cannot be attracted at all to the case of a juvenile delinquent, since he or she does not feel the need of any such pardon, for, unless there is any provision for punishment the question of granting pardon can hardly arise. Mr. Basu again points out that the provisions of Section 306 or 307 of the Code will not be attracted here for the further reason that the authority to grant pardon emanates from the authority to try and since the Court of Session has no jurisdiction to try a juvenile delinquent, it is not within the competence of that Court to consider the question of tendering pardon to such an accused.

5. As against the above, the contention of Mr. Moitra, the Ld. Addl. Public Prosecutor, has been that the exercise of the power of tendering pardon under the provisions of Section 306 or 307 of the Cr. P.C. is touching the procedural law and is no part of any substantive law and it does not affect the rights of an accused person prejudicially and the whole idea behind these provisions of the Code is to obtain evidence from a person who has been concerned in or privy to the commission of the offence so that the main perpetrators of the crime do not escape with impunity due to lack of evidence in such a grave offence. Mr. Moitra points out that in view of such an object of the said provisions of the Code the only question with which a Court should be bothered while dealing with such a prayer for granting of pardon to a juvenile delinquent is whether the tests as laid down u/s 118 of the Evidence Act are satisfied. According to Section 118 of the Evidence Act all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions. In the Explanation to this section a lunatic also has been excepted. Thus, according to Mr. Moitra, the only factors disqualifying a person to be a witness are lack of power of understanding and lunacy, but not childhood or minority. In other words, under these legal provisions a child is quite a competent witness provided it has the power of understanding the questions put to it and is not a lunatic. Mr. Moitra further contends that under the Juvenile Justice Act certain safeguards have been provided for the protection of the interests of the juvenile delinquent, but the provisions of Section 306 or 307 Cr. P.C. are purely procedural laws to enable the Court to obtain evidence of an accomplice in respect of an offence and hence they have absolutely nothing to do with the different provisions of the said Act, far less adversely affect the safeguards so provided therein for protecting the interests of the juvenile, because the Juvenile Justice Act only deals with the trial of a juvenile and matters emanating from and touching upon such trial and a matter like the present one namely tendering of pardon to an approver does not form part of such trial and is beyond the scope of this Act. The further contention of Mr. Moitra is that in order to attract the provisions of Sections 306 or 307 of the Code it is not

necessary that the person concerned should be arraigned as an accused but, on the other hand, such tender can be given even to a person who is not an accused. It is also argued by Mr. Moitra relying upon the decision reported in State (Delhi Administration) Vs. Jagjit Singh, that once an accused is granted pardon, he ceased to be an accused, or for that matter, a juvenile delinquent and thus logically during such period the Juvenile Justice Act will not have any manner of application on him, but, however, if he fails to comply with the conditions on which such pardon was tendered, then Section 308 will be applicable and he will again revert to the position of a juvenile delinquent and law will take its course. Lastly, Mr. Moitra contends, to refuse to grant the pardon as sought for will be rather opposed to the solemn objective of the Juvenile Justice Act, he being deprived of the benefits of these benevolent provisions of the Code.

6. As regards the first contention of Mr. Basu that giving of pardon to the juvenile delinquent as has been done under the impugned order would be against the spirit of the Juvenile Justice Act, I find it difficult to accept its logic. In order to protect the interest of the juvenile delinquent our legislature has in its wisdom expressly provided certain safeguards which are contained in Chapter-IV of that Act (Sections 18 to 25). It is the contention of Mr. Basu that the Juvenile Justice Act is a special law within the meaning of Section 4(2) of the Code of Criminal Procedure and the juvenile who is to be dealt with under this Act has been practically guarded against the rigours of an ordinary trial that is followed in case of an adult accused person cannot be relegated to that system of trial in the name of exercise of grant of pardon in favour of him or her by the Court. According to Mr. Basu, the provisions contained in Sections 18 to 25 of the said Act spell out the procedure in details as to how a juvenile shall be dealt with and it is a totally different manner from that in which an ordinary adult accused person is to be handled right from the time when he is arrested by police and brought before a Juvenile Court till he has been found on enquiry by that Court to have committed an offence as alleged. On a careful perusal of the provisions of the abovementioned sections of the Act and comparing them with those of Sections 306 or 307 of the Code of Criminal Procedure, I get the impression that there is no question of overlapping between the two. Those provisions of the Act relate to the procedure in connection with the trial or, for that matter, ''enquiry'' into the allegations against the delinquent by the Juvenile Court and they are totally unconnected, with the said provisions of the Cr. P.C. which relate not to trial of the person concerned but to a question that exclusively touches upon his or her competence to be a witness. This is the reason why it appears from a plain reading of the said provisions of the Act as well as of the Court that nowhere the later provisions have been given exception from being applied to a juvenile. Had it been the intention of the legislature to exclude those provisions of the Code from the ambit of the law relating to the juvenile delinquent, then that fact would have been mentioned in express terms just like a number of other matters which have been excluded expressly under those sections from the scope of the ordinary

criminal Court. The spirit underlying the provisions of the Juvenile Justice Act appears to be to ensure that the interests of the juvenile are fully protected and are not in the least prejudiced. By allowing the juvenile to be an approver and to give evidence disclosing the circumstances leading to the commission of the offence in question the Court cannot be said to be causing any harm or prejudice to the interest of the juvenile. Rather, to apply such provisions of the Code to a juvenile will enure for his benefit. As soon as a juvenile is tendered pardon, it loses its character as an accused or delinquent and it steps into the shoes of a witness. It should not be forgotten that the sole object of the above provisions of the Cr. P.C. is to obtain at the trial of a case evidence of a person who appears to have been concerned in or privy to the offence in question. Such a simple and benevolent provision has nothing to hamper or hinder the interests of a juvenile delinquent. According to the provisions of Section 306 or 307 of the Code pardon may be tendered to ''any person'' irrespective of whether he is an accused or not or delinquent or not and the Court is giving him or her such a pardon for the purpose of arriving at the truth by getting his evidence disclosing the circumstances under which the offence was committed and also the role of the other accused persons in such commission of the crime and during such an exercise by the Court the fact of such person''s being a juvenile delinquent does not assume any special significance. In such a situation the juvenile delinquent having stepped into the shoes of a witness is to be governed by the law which governs a child-witness simpliciter, that is to say, the provisions of Section 118 of the Evidence Act as discussed above. The further argument of Mr. Basu is that Section 20 read with Section 39 of the Juvenile Justice Act adds a special dimension to the way in which the trial of a juvenile delinquent is held. Because, under this Section 39 the procedure of such trial will be that of a summons case and u/s 21 it should not be called ''trial'' but it should be termed ''enquiry''. Similarly, according to Mr. Basu, again; Sections 24 and 27 of the Act puts specific embargo on the trial of the juvenile together with an adult person and they enjoin upon the necessity of separating the two physically. The magistrate holding trial of a juvenile has been under an obligation to take his seat in a building away from the one in which the ordinary adult accused persons are tried (under Section 24); while Section 33 goes a step further in protecting and safeguarding the interests of such delinquents by making it mandatory on the part of the competent authority to take into consideration certain special circumstances as enumerated thereunder, for example, the age of the juvenile delinquent, his physical and mental health, the circumstances in which he or she was living, his or her religious persuasion, etc. Mr. Basu contends that provision for such differential treatment severing the juvenile from the periphery or ordinary criminal law and subjecting them exclusively to the jurisdiction of the Juvenile Justice Act puts it beyond controversy that once an offender is found to be a juvenile he or she is not to be dealt with under any law except the Juvenile Justice Act, 1986 and no part of the Code of Criminal Procedure has any manner of application in such regard. But here again I am to repeat what I have already observed above that these sections of the Act formulate the procedure

which is to be observed for the purpose of holding trial of juvenile delinquents and such provisions have no applicability in respect of a question touching the exercise of the power of granting pardon by a competent Court u/s 306 or 307 Cr. P.C, to any person for the purpose of obtaining his or her evidence regarding the commission of the offence in question.

7. The second contention of Mr. Basu is that the provisions of Section 308 Cr. P.C. serve as an index of the intention of the legislature that the provisions relating to granting of pardon as laid down u/s 306 or 307 are not meant for the juvenile delinquent. According to Section 308 Cr. P.C., if a person who has been tendered pardon violates any condition of the pardon and conceals anything essential or gives any false evidence, then such person may be tried for the offence in respect of which the pardon was so tendered and also for the offence of guying of false evidence. Mr. Basu argues that since a juvenile cannot be subjected to such a procedure of trial as it spelt out under this section and since he or she cannot be punished, the legislature clearly meant that the provisions of the Code relating to tendering of pardon are not for this juvenile. This contention does not impress me. Section 308 Cr. P.C. only lays down the procedure to be followed in the event the Public Prosecutor alleges that the approver has given false evidence. If ultimately such an exigency arises, if the juvenile concerned having found to have given false evidence and violated the conditions of the pardon is to be tried, then he or she will be tried according to the procedure prescribed under the Juvenile Justice Act. So long as he was under the tender of pardon granted by the Court, he was being presumed to have ceased to be a delinquent having gained the status of a witness. Now that the pardon is withheld, the juvenile is reverted back to the status of a delinquent and will be dealt with as be-fore in accordance with the procedure as prescribed under that Act, In short, there is no room for any clash, or conflict between the provisions of Section 308 Cr. P.C. and those of the Juvenile Justice Act. Since by virtue of such pardon being granted to that person, he or she gains the status of a witness the only question which will assume significance for being considered by the Court is whether he or she can be a competent person to be a witness under the provisions bf Section 118 of the Evidence Act. The question that has been raised by Mr. Basu is practically touching upon such an aspect of the matter, namely, whether the person who has been tendered pardon being a Juvenile can be legally competent to be an approver-witness: According to Section 118 of the Evidence Act all persons shall be competent to testify unless the Court considers that they are prevented from under-standing the questions put to them ion from giving rational answers to those questions. The explanation to this section provides that a lunatic will not be a fit person for being granted such a privilege. Therefore a child under this section of the Evidence Act is quite a competent person to testify, provided it can understand the questions and can give rational answers thereto. It may be mentioned here that in the instant case it in nobody''s case that the concerned juvenile delinquent is in any way deficient in the matter of such

understanding or answering. Besides this, the Court has nothing more to enquire as to the competence of the juvenile concerned for the purpose of considering the question of granting pardon to him. In short, all that is being done by virtue of such an exercise, the person is being given the status of a witness after being discharged from his status as an accused or a delinquent and thus there is absolutely no question of the Court''s violating or departing from the provisions of the Juvenile Justice Act by tendering pardon to the juvenile concerned.

8. The third contention of Mr. Basu is that the authority to grant pardon emanates from the authority to try and since the Court of Sessions Judge cannot try a juvenile delinquent it cannot exercise the power of granting pardon to it, Mr. Basu contends that an act of the Court must be justified by law, otherwise it is a nullity and where a juvenile having been taken out of the realm of ordinary law has been placed under a Court specially constituted for his trial, the Additional Sessions Judge cannot have any authority in law to grant pardon; to him, particularly when such a juvenile does not stand in any manner whatsoever before this Court seeking its magnanimity to grant him pardon. According to Mr. Basu, grant of pardon to a person falls within the procedure established by law and examination of such a person as a witness is also procedure established by law and accordingly whenever pardon is granted and such a person is examined as a witness, it must be strictly according to law and ,not according to the whims or pleasure of the Court and if a juvenile is subjected to such a procedure and in consequence the Court receives evidence from such an offender, who has been granted pardon in respect of an offence to which he is supposed to be directly or indirectly concerned in or privy to, then the legal mandate of Article 21 of the Constitution stands infringed and it is implied that he is being compelled to be a! witness against himself as well giving evidence against the other accused persons, because he was also directly or indirectly concerned in or privy to such an offence and therefore this leads to the recognition and indirect approval of a proposition which is in contravention of the established principle that nobody can be compelled to be a witness against himself. Moreover, Mr. Basu contends, even if for the sake of argument it is taken for a moment that an ordinary Criminal Court can grant pardon to a juvenile, it can never record a finding in which the juvenile is directly or indirectly concerned in or privy to for the offence in question, because such a finding has got to be recorded by this Court if it is to examine such a person as a witness and logically or logistically, no ordinary Criminal Court has the right to record such a finding in respect of an offence committed by a juvenile.

9. So far as the point canvassed by Mr. Basu above is concerned namely, that the Court of Additional Sessions Judge having no power to try the juvenile accused cannot grant him pardon, I am to observe that this is not the requirement of the law. u/s 306 a Magistrate is competent to grant such pardon to such a person in a Sessions triable case at any stage before the case has been committed to the Court of Session and u/s 307 of the Code and after the case has been committed there it is for that Sessions Court to grant such pardon and take such evidence. Had it been

the intention of the legislature that unless a Court has the jurisdiction to try such a person. it will not be in a position to grant or tender pardon or take evidence of such a person then the Magistrate could not have the competence to do this job. The only requirement of the law, of course, is that the Court which would grant such pardon must have the territorial jurisdiction to deal with such an offender. Therefore, I am unable to agree with Mr. Basu in this respect when he advances this argument. The Sessions Court is taking the evidence of the juvenile delinquent because it is trying the other accused persons of the case and evidence is being taken by it in connection with such trial of the other accused persons of the case and the pardon that is being granted to the juvenile will have effected in the same way in which the pardon granted by a Magistrate u/s 306 Cr. P.C. to a person who will be tried by the Sessions Court and not by him. Moreover, it is to be noted that for applying the provisions of Section 306 or 307 Cr. P.C. does not require that the applicant must be an accused of the case in question. Any person is entitled to seek such an order from the Court which is in seisin of the matter. Therefore, in case of such a person who has not yet been an accused, the question whether the Court can try him or her becomes immaterial. The whole concern of the Court while granting such pardon is to obtain evidence of the person to whom such pardon is granted and in order to do that what is to be ensured by the Court is whether such a person is otherwise competent to give evidence as a witness in view of the provisions of Section 118 of the Evidence Act. If Mr. Basu''s argument is carried to its logical extreme that ordinary Court cannot examine a juvenile and only a juvenile Court has the competence to do it, then not a single child can ever deposed before such a Court in connection with the Sessions Case. That this argument of Mr. Basu is not justified is palpable also from the provisions of the Juvenile Justice Act as laid down under its Section 8 which provides that when any Magistrate not empowered to exercise the power to a Juvenile Court is of the opinion that a person brought before him under any of the provisions of the Act (otherwise for the purpose of giving evidence) is a juvenile, he shall record such opinion and forward the juvenile and the record of the proceedings to the competent authority having jurisdiction over the proceeding. The words in the bracket, namely, otherwise than for the purpose of giving evidence make it fully clear that a Magistrate though not empowered to try a juvenile delinquent need not forward that juvenile to any competent Court, if the purpose for which that person has been brought before him is his or her examination as a witness. Indeed, this provision of the Juvenile Justice Act is an answer to the question raised by Mr. Basu and they make it abundantly clear that a Magistrate though not empowered to try a juvenile will be competent to examine him and obtain his evidence. In my opinion, this section has been enacted by the legislature deliberately with a view to supplementing the provisions of Sections 306 or 307 of the Criminal Procedure Code. The contention of Mr. Basu is that by granting such pardon to a juvenile delinquent the mandate of Article 21 of the Constitution is being infringed and negated by the Court of Session because lawfully it cannot grant pardon to such a person is of no avail in view of my foregoing observation

that the Court of Session has full competence to grant such pardon to such a juvenile. The further point raised by Mr. Basu that in order to examine such a person after granting pardon to him the Court has to record a finding to the effect that the juvenile is directly or indirectly concerned in or privy to for such offence and recording to such a finding being adverse the interest of a juvenile cannot be done by an ordinary Criminal Court is also not acceptable because it is not correct to say that the Court is recording any finding as to the involvement of the concerned person in the commission of the offence in the sense in which a finding of guilt is arrived at and recorded by the Court. In view of the requirement of the provisions of Section 306 or 307 Cr. P.C. the Court is only ascertaining whether the person was concerned in or privy to the offence in question with a view to grant him pardon and take his evidence. Such an order, if any, has no bearing on the question of whether any such person is found guilty of the of-fence or not nor such notes will have any evidentiary value or not they can be used as evidence or materials for the purpose of seeing whether the charge has been proved against such person or not. But such an order: of the Court will only serve a procedural purpose and will have no effect or impact on the merits of the case.

10. Fourthly, it is contended by Mr. Basu that the philosophy of the Criminal Law and that of the Juvenile Justice Act are totally different. In the former the provisions are essentially punitive towards the accused persons while the latter in its content, character, tenor and ideological set-up is out and out reformative. The Act, according to Mr. Basu represents a wholesome legislation which seeks to achieve certain social objects as enumerated under Article 39 of the Constitution, for example, to bring wayward misguided juvenile to the mainstream of the society not by punishing them but by standing beside them with tolerance land perservence to ensure that the mainstream of the society and the whole generation to be built up do not go astray and that is why it is not permissible nor even desirable that any ordinary Criminal Court which has functional necessity based on imposition of punishment on the offenders should deal with a juvenile in respect of an offence allegedly committed by him. The functional structure of the Code of Criminal Procedure and the Juvenile Justice Act are so vastly different and the social objective sought to be achieved by these two statutes are so opposite that the Criminal Procedure Code and its provisions cannot be allowed to step into the area earmarked for Juvenile Justice Act and consequently a Court of Session can come into the picture as a functionary of the Juvenile Justice Act only in a limited framework as bestowed to it under the provisions of Section 37 of this Act, that is to say, only in respect of appeal being preferred, if at all, by a juvenile against an order made by a competent authority under this Act by which the said juvenile may have been aggrieved and therefore so far as the question of granting of pardon to such a juvenile is concerned, the Sessions Judge suffers from a total lack of jurisdiction. I find it different to subscribe to such a view of Mr. Basu. I am to repeat that the provisions of the Juvenile Justice Act are mainly confined to the trial, or for that

matter, the enquiry into the allegations levelled against the juvenile delinquent by the Juvenile Court. The subject of granting of pardon does not fall within this sphere of dealing with a juvenile accused. When it comes to the granting of pardon to a person by the Court of Session, the distinction between an ordinary accused and a juvenile one loses of its significance and becomes totally immaterial. The Court at the time of exercising this discretion is to treat the subject as a person who has been concerned in or privy to the commission of the crime in question and not as an accused person. The expression, ''any person'' is an index of the intention of me legislature in this regard and a person who has not been, arraigned as an accused is also to be given this privilege by the Court and hence the question whether he is a juvenile delinquent has no special significance in the matter of considering the question from the angle of the object that his or her evidence is to be taken. This is the reason why the above contention that the provisions of the Criminal Procedure Code cannot be allowed to step into the area earmarked for Juvenile Justice Act cannot be found to be applicable here. The question whether a person should be granted pardon or not in order to be examined as a witness does not fall within the ''area earmarked for the Juvenile Justice Act''. In other words, the Juvenile, Justice Act does not make any provision encroaching into this field touching this procedural question and has left it for being dwelt upon by the Code. The provision of Section 8 of the Act which I have discussed above at length only strengthen such a view. In this connection Mr. Basu''s argument is that resort to Section 8 is a misplaced one. According to him this section preserves the authority of a Magistrate to record the evidence of a juvenile in a proceeding before him when the juvenile is sought to be examined as a witness, but the facts of the present case do not present the juvenile before the Court as a mere witness but as a partner in a crime who achieves the status of a witness on pardon being tendered to him. A mere witness who is to be governed by the provisions of Section 118 of the Evidence Act and an accused who turns into a witness on accepting pardon tender to him cannot be equated. But, to my mind, this is far from correct. Examination of any person as a witness, whether ordinary or special, by a Court has to be held in accordance with the procedure which is provided under the Indian Evidence Act and no other law. The granting of pardon to any person, be he an accused in any case or not, and his consequent examination by a Court are governed by Section 118 of the Evidence Act. There is no other section in this Act to be applicable to such a case. Mr. Basu''s contention that the legal situation facing us do not warrant application of Section 118 of the Evidence Act, because the question posed here is not the physical or mental capacity of a person to depose, but the legality in examining the juvenile as a witness for the prosecution after tendering pardon to him cannot be accepted for the simple reason which I have already shown above that such tendering of pardon to a juvenile delinquent is not legally impermissible and is well within the competence of the Court of Session which is in seisin of the offence in question and in that view of the matter, once it is found that such tendering of pardon and examination of the juvenile as a witness are lawful, the procedure according to which such examination

will have to be held wilt be as provided under the said Section 118 of the Evidence Act. It has been argued that there is substantial difference between a juvenile witness simpliciter and a juvenile accused who has been transferred into a witness for the State on pardon being tendered to him, because in case of the former there is no intervention or application of the law on pardon while in case of the latter it is the grant of pardon which is the determinative factor. But the reason for this differentiation is not given. It is not understood why there should be any difference in the procedure between the two when both are falling in the same category, namely, witness. Granting of pardon does not give rise to any basic distinction between them when the nature of their function, namely, to give evidence or to testify before a Court of law is identical. It is an well settled position that while exercising the power u/s 306 or 307 Cr. P.C. and dealing the person who has been granted pardon and turned into a witness the Court is to follow the procedure as prescribed u/s 118 of the Evidence Act. I find no justifiable reason to hold that these provisions will not be applicable in case of a juvenile accused although tender of pardon to him by the Court has been found to be otherwise legal.

11. Fifthly, Mr. Basu''s argument focuses on the point that anything done by a Court like that done by the Addl. Sessions Judge in the present case under the Code of Criminal Procedure has got to be based on procedures which are codified and in view of the prohibition as contained u/s 4(2) of the Code of Criminal Procedure there is no room for doubt that whenever any subject-matter is covered by local or special law in respect of any offence, then investigation into such offence, enquiry into trial or otherwise dealing with such offence must be according to procedure as such special or local law contains and the Code of Criminal Procedure will disappear from the scene and therefore the said provisions of the Cr. P.C. cannot be taken resort to or observed in any matter relating to a juvenile delinquent who is to be guided and governed exclusively by the Juvenile Justice Act. To this, as I have already held above, my answer will be that" everything regarding trial or, for that matter, ''enquiry'' in respect of juvenile delinquent will certainly be subjected to the procedure as prescribed under the said law. But regarding the aspects which are left untouched by this Act it is needless to mention that the Code of Criminal Procedure will come into operation and provide the guidance. On the question of granting of pardon to a juvenile accused the Act no doubt remains totally silent but certainly that cannot give rise to a conclusion that the legislature intends that such an accused should be deprived of the benefit or privilege of these provisions of the law which are applicable to an ordinary accused, nor in fact there is any scope for drawing any such conclusion, because there is nowhere any bar or prohibition to the effect that in the absence of any provision in the Juvenile Justice Act on such a question the provisions of the Code of Criminal Procedure cannot be extended or applied to them, particularly when many other provisions of that Code are actually being applied to them. This finding gets strengthened by what has been provided u/s 8 of the said Act which I have already discussed above. According to these provisions, if

any person being a juvenile delinquent is brought otherwise than for the purpose of giving evidence before any Magistrate other than a Magistrate who is empowered to exercise the powers of a juvenile Court then such Magistrate shall forward that juvenile to the competent authority. It is implied that if the purpose is for giving of evidence, then the former need not forward the juvenile to the competent authority for such a purpose, but may himself record his evidence. It is anybody''s guess as to what could be indicated by such a provision. Giving of evidence otherwise than in connection with trial certainly refers to the statements that may be made by such a person for such purposes as aforesaid and these provisions appear to give a definite hint of the fact that they are intended to: serve as supplemental to the provisions of Sections 306 or 307 of the Cr. P.C.

12. In the sixth place, Mr. Basu points out that since as per the Juvenile Justice Act ajuvenile can neither be convicted nor punished (vide Section 21 of the Act) while the provisions u/s 306 or 367 Cr.P.C. will be applicable only in respect of the offences which are punishable with imprisonment that may extend to seven years or with more severe sentence, obviously these provisions cannot be attracted to the case of ajuvenile delinquent. According to him the question of pardoning a juvenile delinquent cannot arise as there is no question of punishing him or her. To put it in the very language of Mr. Basu, "if there is no liability at all of the juvenile concerned, how the question of exonerating him from any such liability comes?"

13. Giving careful consideration to this reasoning of Mr. Basu, I am inclined to express my inability to be at one with him. The fact that the provisions of Section 306 or 307 Cr. P.C. apply only to offences punishable with imprisonment for seven years or more severe sentence does not mean that ultimately the accused has to be actually punished with such a sentence. It implies that the offence of which cognizance has been taken by the Magistrate must be punishable with imprisonment of seven years or more, but not that the offender must have to be inflicted with such an imprisonment actually. Ultimately, the trial may actually end even in acquittal of the accused or conviction of the accused of an offence which happens to be punishable with less severe sentence, but that fact will have no bearing upon the question. What is required, at the time when the question of tendering pardon to the subject arises it must be shown that offence alleged against that person is punishable with such length of imprisonment. It is true that under the Juvenile Justice Act no delinquent juvenile shall be sentenced to death or imprisonment or committed to prison in default of payment of fine or of furnishing security (vide Section 22 of the Act) but that fact has got no disconcerting effect on the applicability of Section 306 or 307 of the Code to the case of a juvenile delinquent. Although, in consideration of his or her age, the framers of the law have meticulously taken pare to ensure that he is not sent to any jail or prison on any count, they have not given a go-by to the necessity of conducting an ''inquiry'' into the allegations against the juvenile delinquent and of substituting the whole set of traditional, punitive norms by suitable reformatory measures short of imprisonment

which are laid down u/s 21 of the Act. Section 21 runs as follows :--

(1) where a Juvenile Court is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Juvenile Court may, if it so thinks, fit,--

(a) allow the juvenile to go home after advice or admonition;

(b) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, or such parent, guardian or other fit person executing a bond, with or without surety as the Court may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(c) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour, and well-being of the juvenile for any period not exceeding three years;

(d) make an order directing the juvenile to be sent to a special home,--

(i) in the case of a boy over fourteen years of age or of a girl over sixteen years of age, for a period of not less than three years;

(ii) in the case of any other juvenile, for the period until he ceases to be a juvenile.

14. From this section it is thus seen that although the sentence of imprisonment has been given a go by, the juvenile has not been allowed to go scot-free. If the charges levelled against him are found proved, he has to be subjected to certain corrective measures like those enumerated in the said section or the penal measure of fine. To be released on probation of good conduct or to be placed under the care and supervision of any fit institution for a period of three years or to be sent to a special home for similar length of time or to make payment of fine, etc. is certainly restrictive of the movements of the juvenile concerned and definitely it partakes of somewhat penal character. Here lies the answer to the question raised by Mr. Basu, namely, that there is nothing to show as to against what punishment such ''pardon'' is to be tendered in case of a juvenile delinquent who is not to face any penalty of imprisonment. Moreover, any finding of the Court to the effect that the juvenile has committed an offence though not accompanied by an order imposing the penalty of imprisonment may very well serve as an order that may be said to have the effect of making him aggrieved and that is why Section 37 has been incorporated in the Act enabling the juvenile to prefer an appeal against such an order. Sub-section (2) of this Section 37 provides that no appeal shall lie from any order of acquittal passed by a Juvenile Court. This signifies that the order by which the Juvenile Court holds that the offence alleged against the concerned juvenile delinquent has been found proved is for all practical purposes an order of conviction, inasmuch as, this may at the least have the effect of casting a stigma on his character and career and therefore, when the Court of Session grants ''pardon'' to such a juvenile delinquent,

such ''pardon'' can be said to be directed against such a probable finding of the Juvenile Court entailing some sort of liability that would befall the juvenile.

15. Lastly, Mr. Basu has also put into question the legal maintainability of the petition concerned filed by the mother on behalf of the juvenile praying for tender of pardon in view of the reason that she cannot have any locus standi to file any such petition for her son. This argument also is not acceptable. It goes without saying that a juvenile delinquent being a minor, that is to say being under the age of sixteen years (in case he is a boy) and the age of eighteen years (in ease she is a girl) is not under the law competent to make any petition before a Court of law by himself or herself and such steps can only taken by his or her legal guardian. The term ''guardian'' has been defined u/s 2(g) of the Juvenile Justice Act which lays down that ''guardian'' in relation to a juvenile includes any person who, in the opinion of the competent authority having cognizance of any proceeding in relation to a juvenile, has for the time being the actual charge of or control over that juvenile. So, if the mother of any such juvenile-accused holds the actual charge of or control over him or her and that claim of the mother is not disputed then she should be taken as the guardian for the relevant period and her entitlement to take care of the person and property of the said juvenile cannot be challenged.

16. In conclusion, I am to observe that to say that the ordinary Court of Session has no power to grant pardon to a juvenile for the reason that it has no power to try him or her will be to act against the intention of the legislature, because neither in the Code nor in the Juvenile Justice Act there is any whisper, any iota of provision that a juvenile delinquent cannot be given pardon by such a Court. Rather, it is the positive provision as contained in Sections 306 or 307 of the Cr. P.C. that a Magistrate in a Sessions triable case so long as it has not been committed to the Court of Session and a Sessions Court in such a case, after it has been committed to it, may tender pardon to any person who has been found to be concerned in or privy to the offence in question provided that he or she undertakes to make a true and full disclosure of the facts leading to the commission of the offence. Viewed the question from a different angle, when a person voluntarily offers himself as an approver and prays for such a privilege after giving an assurance of disclosing the true facts in full, the Court can have hardly any option but to follow the mandatory provisions of the said sections and grant the pardon in exchange of obtaining his or her evidence. It should always be borne in mind that nothing prejudicial or harmful to the interest of the concerned juvenile is being done by the Court by exercising such power but on the contrary it is bestowing the benevolent provisions to the juvenile and it is also giving effect to the policy of preventing escape of the principal offenders with impunity due to the lack of evidence by granting such pardon to an accomplice for obtaining true evidence. The Juvenile Justice Act has been enacted with a view to making available a host of benefits to the child-accused and in a sense it may be said that it will rather be opposed to the solemn objects of the said Act if we deprive the juvenile of the benefits which can be given to him by applying Section 306 or 307 of

the Code of Criminal Procedure.

17. Before parting with, I cannot but lay down a few words to give vent to an undercurrent of thought which has been pervading my mind while this topic has been under scrutiny. This is touching a question as to the legal maintainability of the very objection which has been raised by a co-accused against, such an order of the Court of Session. The question is wherefrom or on what basis a co-accused can challenge an order of the Court which is for all intent and purposes an executive order touching the procedural aspect and not a judicial one. Such tender of pardon and its acceptance by the person concerned is absolutely between the Court concerned and the person to whom it is made and if such tender of pardon be accepted by the accomplice concerned, the obligation placed upon the prosecution will be to examine him as a witness in the case. When he will be examined as a witness by the prosecution, then such co-accused will get an opportunity to cross-examine him and from such cross-examination he will be in a position to show that the statement made by the concerned person who has been granted pardon is a false one (vide the decision in M. M. Kochar v. The State, reported in M.M. Kochar Vs. The State, . In my opinion, as regards the question whether the Court below could be legally competent to tender pardon to a juvenile delinquent such a view will be all the more applicable for the further reason that it is on the basis of a petition filed on behalf of that juvenile itself that the Court is granting the pardon and if there is any question of anybody''s suffering any prejudice because of the passing of such an order due to the fact that he is a juvenile, it will be that juvenile alone and none of the co-accused can have any reason to be affected by virtue of such an order or can have any cause of action on this score that the person to whom such pardon has been tendered is a juvenile and hence such a co-accused cannot have any locus standi to challenge such an order on such a ground. At the most, it may be said on behalf of the petitioner that as a result of pardon having been tendered to one of the accused persons there will arise the scope for saying that as a result of such pardon being granted and ultimately in consequence of the deposition, if any, being made by such an accomplice, they may suffer grave prejudice and in this way their interest will be hampered. But as to that, as it has been pointed out in the foregoing lines, the order being of interlocutory nature cannot be the subject-matter of revision u/s 397 or, for that matter, Section 401 Cr. P.C. In this Section I am inclined to refer to another decision reported in Krishna Lal Gulati Vs. The State, A single Bench of Allahabad High Court (Lucknow Bench) held therein as follows.

"I have heard the learned counsellor the parties at some length. Learned counsel for the State raised a preliminary point that the revision in view of the amended provision in Cr. P.C. was not maintainable. He referred to Sub-clause (2) of Section 397 which reads:--

"397 (2). The powers of revision conferred by Sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding." The learned counsel maintained that in view of this provision the order passed by the learned Sessions Judge was an interlocutory order and as such the revision itself was not competent. On the other hand the learned counsel for revisionist argued that the order passed under Sections 306 or 307, Cr. P.C. is not an interlocutory order but is a final order passed with respect to a proceeding before the trial Court. The proceeding related to a tender of pardon and pardon having been granted the proceedings relating to pardon stood concluded. I do not find myself in agreement with the learned counsel for the revisionist, There is ample force in the contention of the learned counsel for the State that this revision itself is incompetent. There cannot be two opinions that the order extending the pardon is in relation to a trial and even after conclusion of the trial in an appeal it is open to an accused person to question the correctness and impropriety of the pardon extended to a person. It is also open to challenge the statement of approver. In this view of the matter it cannot be said that a finality is reached, if pardon is extended. The rights of the parties are not conclusively decided by order of tender of pardon. Rights subsist and can be questioned even at the stage of arguments before the trial Court as well as before the appellate Court. I have, therefore, no hesitation in coming to the conclusion that the order passed by the learned Sessions Judge in the instant case is an interlocutory order and under the amended provision of Section 397, Criminal Procedure Code revision from such interlocutory orders is not permissible."

18. To my mind the above findings are full of force and they held good to the facts and circumstances of the present case also. Since the impugned order of the ld. Sessions Judge is in the nature of an interlocutory order without the rights and contentions of the parties being conclusively decided by virtue of the grant of tender of pardon and since the evidence of such a witness, if at all, given during the trial will remain open to question and challenge, it cannot be said that the order has reached finality so as to form the subject-matter of revision at this, stage.

19. The same principle was enunciated in a much earlier judgment of a single Bench of Madras High Court reported in In Re: R. Akbar Sheriff, . (In re Akbar Sheriff) wherein it was held as follows :

"I do not think that the act of the Magistrate u/s 337, Cr.P.C. (Old), namely, tendering pardon to a person is revisable by this Court. No authority has been placed before me to show that it is revisable. If there are any irregularities in the grant of the pardon they can be urged by the accused at the trial. The petitions are dismissed".

20. It is to be noted that the present petition has been filed u/s 401 read with Section 482 of the Code. I have already pointed out above that Section 401, Cr.P.C. is not independent of Section 397 and it has got to be read together with Section 397, Cr.P.C. Since u/s 397(2) Cr.P.C., a revisional application against an interlocutory order

is not maintainable, obviously Section 401 alone bereft of Section 397 will be of no value and the petition under, that Section cannot be legally maintainable. So far as Section 482 is concerned the principles with have been settled (vide Madhu Limaye Vs. The State of Maharashtra,) for its application are as follows. First, the power under this Section is not to be resorted to if there is specific provision in the Code for the redress of the grievance of the aggrieved party; secondly, it may be exercised very sparingly to prevent abuse of the process of any Court or otherwise to secure the ends of justice; and thirdly, it should not be exercised as against the express bar of law engrafted in any other provision of the Code. It has been repeatedly observed by the apex Court as well as the High Courts of this country that inherent powers are meant to be exercised with circumspection when there is reason to believe that process of law is being misused to harass a citizen and it shall not be exercised when there is remedy already available or for doubtful or trivial matters or to help those who sleep over their rights in preferring appeals etc. or at least resort after failure in available remedies under the specific provision of the Code. So it is an accepted position that this special power of the Court is to be invoked or exercised mainly to prevent the abuse of process of any Court or to prevent any miscarriage of justice. When a pardon is granted to one of the accused persons in a criminal case on the basis of a petition filed by that person under the clear provisions of the Code it cannot be said that there has been any abuse of the process of the Court or any miscarriage or failure of justice has taken place. In such a case exercise of the inherent powers of the High Court will be unwarranted and uncalled for. The fact that such pardon is being granted to a juvenile delinquent does not make any difference in view of my foregoing discussion and the finding that by allowing such a prayer of the juvenile delinquent concerned no prejudice is being caused to his interest. Hence, the petition invoking the inherent power of this Court u/s 482 challenging such an order of the Sessions Court granting pardon to a juvenile accused is not found to be maintainable in law.

21. In the result in view of the entire discussion made above I am to hold that the Court below was quite justified in passing the impugned order granting pardon to the concerned juvenile and there is nothing be-fore me to interfere with the same. Accordingly the same be affirmed and the revisional application be dismissed.

Malay Kumar Basu, J.

17-6-2002

Later.

22. After the judgment is delivered, Mr. Roy, ld. Advocate for the petitioner verbally prays for an order granting a certificate in his favour under Article 134A of the Constitution of India to the effect that the case involves a substantial questions of law as to the interpretation of the Constitution. After considerations I am not inclined to grant such a certificate and accordingly the prayer be rejected.

23. Thereafter, Mr. Roy prays for stay of the operation of the above judgment and order on the plea that he would move against the same before the apex Court. The prayer is considered and rejected.

24. Mr. Roy further prays for getting sup ply of a certified copy free of cost of the said judgment and order on the ground that he would apply for special leave. The prayer is allowed. The certified copy of the above judgment and order free of cost be supplied to the petitioner, as prayed for by the Criminal Department of this Court.

25. Let this order be communicated to the Court below by the office forthwith.

26. Xerox certified copies, if applied for, may be supplied to the parties so applying within ten days from the date of application.