CHAPTER V

JUDICIAL PROCEEDINGS IN CRIMINAL CASES RELATING TO CHILDREN

I GENESIS OF JUVENILE JURISDICTION

THE COMMON law right of *parens patriae* endowed the chancery courts to exercise authority over children in the absence of responsible parental control. The adjudication of actions of children in respect of lawlessness began to be thus recognised on the basis of status, although the nature of the act did not vary from the one which fastened liability on adult persons.

In India, the statutory recognition of jurisdiction of courts in cases of juveniles seems to have been given in the Reformatory Schools Act, 1897.[1] Although the power conferred on the courts was limited to sending a youthful convict to reformatory schools, instead of imprisoning him, the power in its essential features is meant to be in the nature of basic equitable jurisdiction exercisable by the chancery courts over the children in criminal matters.

However, the foregoing provision was affected by the Madras Children Act, 1920 which divested the criminal courts to assume jurisdiction over children under the Reformatory Schools Act, 1897. Such a move occasioned the central legislature to bring in an amendment in the Code of Criminal Procedure in 1923, to insert section 29B in the Code.[2]

1. See ss. 8-10, Reformatory Schools Act, 1897.
2. The Joint Select Committee reported on the Bill that "in view of the fact that the Reformatory Schools Act, 1897 has to a considerable extent been repealed in Tamil Nadu by Tamil Nadu Children Act, 1920, and may by repealed elsewhere we have proposed an addition to the new section 29A to provide for such cases."

Section 29B of the Code of Criminal Procedure, 1868, emphasised the need and rationale for a judicial procedure which could be used for purposes of adjudication in criminal proceedings of child offenders. It provided :

> Any offence, other than one punishable with death or impnisonment 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, subsection (1), of the Reformatory Schools Act, 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any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.

The newly enacted Code of Criminal Procedure, 1973 streamlined the theme of adjudication by status, and encompassed in it the possible methods known to the administration of criminal justice due to the march of behavioural sciences. Section 27 of the Code of 1973 provides:

> Any offence not 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 sixteen years, may be tried by the court of a Chief Judicial Magistrate, or by any court specially empowered under the Children Act, 1960 or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

The 1973 law on the subject has thus shown a lead over the earlier legislation, inasmuch as, the status of juveniles for differential treatment has been changed from the age group of children of fifteen years to the one of sixteen years of age. It has also substituted the Children Act, 1960. A significant change in the scope of the jurisdiction of Juvenile Court is that while under the Reformatory Schools Act, 1897 the magistrate could direct that a juvenile convicted on the charge be admitted to a reformatory schools, the newer legislation comprehends the deployment of measures of correction, treatment and rehabilitation as are currently in vogue within the legal system.

Limitations

Two limitations pervade the exercise of juvenile jurisdiction as enunciated in Code of Criminal Procedure. Firstly, that the offences

punishable with death or imprisonment for life, even though committed by the juveniles, are to be dealt in accordance with the procedure prescribed by the Code generally.[3] Such offences have been legislatively precluded from the concern of juvenile jurisdiction. The exclusion of trial of offences punishable with death or imprisonment for life from the juvenile courts is expressly mentioned in the Code. It, however, remained a matter of judicial policy to shift and separate the cases of children from those of the adults for purposes of giving a differential approach to their cases if the child is involved in a case with an adult. It appears that where a child offender is involved in an offence punishable with death or life imprisonment alongwith an adult it would not be possible to separate the trial of the child from that of the adult. To this extent the law is deficient to the interests of the child offender. In *State* v. *Bans Lal*[4] where the magistrate had committed the child with an adult offender to the Court of Sessions, the High Court found the committal of the child without jurisdiction and it was held that the juvenile court was the only court competent to try an offence committed by a child, and therefore directed to separate the trials of the two offenders for subjecting each of them to their respective courts and procedures. The Union law on children has now crystalised this policy into a rule which forbids the joint trial of child with a person who is not a child.[5]

Secondly, the terms of section 27 of Criminal Procedure Code are permissive with the use of the words "may be tried". This leaves open a choice for the court either to deal with the child offender under any of the two procedures, that is, the one prescribed for juveniles and the other for adult offenders. In case the general procedure is adopted and the trial is held accordingly, it would not invalidate the proceedings on the ground that in case of the child offender, the juvenile jurisdiction was not invoked. It would, however, be desirable to make use of juvenile jurisdiction instead of using the general criminal jurisdiction in the trial of juvenile offenders. This would promote the policy of keeping away the juveniles from the atmosphere of criminal courts. Such a policy would provide ressistance to a juvenile offender's attitude being hardened and thus make him pliable for correctional treatment.

With a view to obviate the latter shortcoming, several state legislatures have enacted special laws to foreclose options to magistrates for exercise of any alternate jurisdiction in the matter of child

3. *Lakhi Sahu* v. *Emperor*, I. L. R. 59 Cal. 86.
4. A. I. R. 1957 Bom. 13.
5. S. 9, Bombay Children Act, s. 24; Children Act 1960; see also s. 17, Saurashtra Children Act, 1956.

offenders not involved in offences punishable with sentence of de th or imprisonment for life. Thus, U.P. Children Act, 1951 provides that section 29B (now section 27 of Code of Criminal Procedure, 1973) shall cease to apply to the areas where the Children Act is in force.[6] Similar provisions are to be found in other state laws.[7]

By and large the shape of law relating to children governing their rights and liabilities is being influenced by the Union law on the subject *viz*; the Children Act, 1960. The incorporation of this Act in section 27 of the Code of Criminal Procedure Code, 1973 lays foundation for juvenile jurisdiction to follow a procedure in a judicial proceeding against the child offender. This Act was modelled after a careful scrutiny of the then existing state laws enacted for the children and is applicable to the Union territories. The Karnataka Children Act which followed the Union legislation on the subject is substantially a reproduction of the Union law.

II PROCEDURE FOR JUVENILES

As has been noted earlier, section 27 of the Code of Criminal Procedure, 1973 prescribes that initiation of criminal process against the juveniles be done in conformity with the special legislation on the subject. It also refers to the Children Act, 1960. Accordingly, the procedure laid down in the Act would need elaboration.

The Act of 1960 lays down in chapter IV the procedure pescribed for the delinquent children. The scheme disclosed by the Act relates to bail and custody of children,[8] information to parent or guardian or probation officer,[9] inquiry by the children court,[10] and orders that may be passed or not passed regarding delinquent children.[11]

6. S. 76, U. P. Children Act, 1951.
7. S. 7, Bombay Children Act, 1964; s. 6, Saurashtra Children Act, 1956; s. 66, Hyderabad Children Act, 1951; s. 23, Children Act, 1960.
8. S. 18 of Children Act, 1960.
9. *Id.*, s. 19 reads :
   Where a child is arrested, the officer in charge of the police station to which child is brought shall, as soon as may be after the arrest, inform,
   (a) the parent or guardian of the child, if he can be found, of such arrest and direct him to be present at the children's court before which the child will appear; and
   (b) the probation officer of such arrest in order to enable him to obtain information regarding the antecedents and family history of the child and other material circumstances likely, to be of assistance to the children's court for making the inquiry....
10. *Id.*, s. 20.
11. *Id.*, ss. 21-22.

Arrest

The criminal process is initiated with the commission of a crime, and if a juvenile delinquent is involved in the matter, the procedure would get attracted for arresting the person concerned. The Children Act, 1960 does not provide for the arrest of children It is the ordinary law enforcement officials who have to exercise the power and authority to take charge of the offender, though he is to be produced before the Children Court. The exercise of police power to arrest a child offender for purposes of producing him before the children court is not consistent with the theme of special treatment contemplated in a scheme of trial which is essentially corrective and not punitive. Al-though the use of arrest power cannot be completely waived yet a limited use of the power would give the system a rational look.

The absence of procedural direction in the Children Act, 1960 for purposes of producing a delinquent offender for disposition according to the provisions of the Act brings in a defect in the character and purpose of the law. The law ought to prescribe the limits of age against whom the coercive power of arrest be exercised and also the nature of offences for which the power has to be used. Thus, persons within the age of 18-22 years can well constitute a group wherein the use of arrest power cannot be deemed unjustified. With a view to narrow down the scope of this power, it would be further desirable that it may be used only in non-bailable cases.

A differential treatment to the child offenders is essential to deal with this weaker group of the society. It may call for a reformative and humane approach, but at times, it is incorrectly construed to the one of piety and benevolence. The benevolent aims of the law need not be atc ross purposes with the rights of the child and obligations, which the society recognises for all other citizens placed in similar situations. The deficiency of the Children Act, 1960 in not spelling out the guidelines as to when and why the coercive power of arrest against the child offenders so as to deprive them of the enjoyment of normal course of personal freedom, is a striking one.[12] The society thus becomes unmindful to the larger interests of a potentially significant citizen when its officials in their zealous efforts seek to act benevolently assumably in the interest of the child.

12. In *State of Punjab* v. *Ajaib Singh*, (1953) S.C.R. 254 the custody of a person by the police by way of recovery from abduction was not held to be an arrest. The rationale of this decision is argued to be extended to custodial arrangements of the children being in their interests. The benevolent interpretation may not necessarily be in consonance with the values which the right to personal freedom seeks to achieve.

Some of the state laws relating to children have, however, been found conforming rationally to the issue of personal freedom by restricting the arrest power to be exercised against the child only in cases of non-bailable offence. Thus, the amended Tamil Nadu Children Act, 1920 provides for arrest by the police of a person under the age of eighteen years on a charge of non-bailable offence.[13] The Bombay Children Act, 1948 provides for similiar powers.[14]

The West Bengal Children Act, 1959[15] and the Karnataka Children Act, 1964[16] contemplate the arrest of a child for both the bailable and nonbailable offences. In fact the person referred to is the "juvenile delinquent" and a "juvenile offender" in West Bengal and Karnataka laws respectively. It may be pointed out here that the Bombay and Tamil Nadu laws also use the expressions "youthful offender" and the "Young offender" respectively, nonetheless the law places limitation on the power of arrest by allowing the police to use the same in non-bailable offences.[17] The absence of such a restriction on the laws of West Bengal and Karnataka states imply that the legislature has intended to use their respective children Acts to provide a mechanism of judicial proceedings for a child offender, and also to use the same law to deal with delinquent and predelinquent behaviours of the young offenders as well. The delinquent behaviour is usually understood in the sense of being a transgression of lawful conduct while the latter merely signifies a potential anti-social attitude of the young delinquent. The use of criminal law for dealing with the undefined behaviours of delinquency is thus inconsistent with the principle of legality.

Bail

Once the power of arrest has been exercised the Children Act provides for bailing out the person. Section 18 of the Act reads:

1. When any person accused of a bailable or non-bailable offence and apparently a child is arrested or detained or appears or is brought before a children's court, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any reputed criminal or

13. S. 18, Tamil Nadu Children Act, 1920.
14. S. 64 , Bombay Children Act, 1948.
15. S. 22, West Bengal Children Act, 1959.
16. S. 57, Karnataka Children Act, 1964.
17. *Supra* notes 13 and 14.

expose him to moral danger or that his release would defeat the ends of justice.

2. When such person having been arrested is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause him to be kept in an observation home in the prescribed manner (but not in a police station or jail) until he can be brought before a children's court.

3. When such person is not released on bail under sub-section (1) by the children's court, it shall, instead of commiting him to prison, make an order sending him to an observation home for such period during the pendency of the inquiry regarding him as may be specified in the order.

The foregoing provision sets out conditions for bailing out a delinquent. It appears that the release on bail, even in bailable offences, is a discretionary matter conditioned by the consideration that the child be kept away out of the association of reputed criminals, and be saved from being exposed to moral dangers.[18] The underlying objective of the law relating to bail and custody of the children is thus motivated by benevolent considerations within the frame set up by the law, *i.e.* by sending children to observation homes where they are put under restraints and discipline of the institution they are sent to.

Investigation

The practical aspect of the proceedings in criminal cases relating to children, is that invariably the criminal process is invoked against the child offender by his arrest by the police. The Children Act of 1960 or the state laws on the subject are silent about the method, technique or procedure to be followed in the investigation of a case where a child is accused of having committed an offence. The usual procedure prescribed in the Code of Criminal Procedure, Police Acts and the rules and regulations made thereunder find their play in the investigation of offences committed by children.

The Children Act, 1960 has sought to introduce a kind of investigation by providing that soon after the arrest of the child, the information of arrest be given to the parent or guardian, if he can be found, to appear before which the child will appear.[19] The law also requires the information to be given to the probation officer so as to enable him to obtain information regarding the antecedents and family history of the child

18. Art. 39 (*f*), Constitution of India, 1950.
19. S. 19 (*a*), Children Act, 1960.

and other materials as may be helpful to the court for making inquiry.[20]

The procedure of "information" under the Children Act might have been thought supplemental mode to overcome the deficiencies of the prescribed investigation procedure, which remains the same in both the cases *i.e.* of adult and child offenders. The information to parent or guardian can only be helpful in securing bail for the child, or securing a proper representation before the court, but it may work effectively only if the parents could be located without the loss of time. Likewise, the report of probation officer is not of much consequence to the rights and interests of the child offender in a trial, because the technicalities of the rules of evidence would preclude its admission and consideration in the course of trial. At best, the report could be considered while the court is seized with the issue of punishment.

The need and purpose of investigation in the matters relating to children ought to differ with other cases. In the latter case the punishment for culpability is the issue, while in the former the underlying idea is to investigate the conditions, factors and associations of the delinquent child with a view to identify these circumstances which prompted him to act with criminality. Once the objectives of investigation are set out, the procedural rules will have to undergo changes in a manner consistent with the concept of social justice which ought to be the governing theme of dealing with the delinquency or the delinquent children.

Inquiry and trial

Once a child charged with having committed an offence is brought before a court authorised to deal with the matters of children, it is incumbent upon the court to hold an inquiry in accordance with a procedure prescribed thereto.[21] Generally, the procedure to be followed is the one which is laid down under the criminal procedure code for the trial of summons cases.[22] The strict and technical rules of procedure are to be eschewed and the essence of the rules are meant to be followed. Thus, the procedure would entail a responsibility on the court to act fairly, impartially and an adherence to the principles of natural justice would be an essential requisite of the trial. In each of these cases the requirement would be to ascertain the fact of the matter for a proper disposal of the case and would consequently lead to reformation, rehabilitation or education of the child offender in a correctional home.

20. *Id.*, s. 19 (*b*).
21. S. 20, Children Act, 1960.
22. *Id.*, s. 39.

As phases of inquiry or trial in the case of a young delinquent are not treated as different parts of criminal proceedings, it is likely that the two get intermingled. The procedure requied to be followed, as far as possible, is the one which is used for the trial of summons cases by magistrates. In this procedure no formal charge need be framed.[23] The procedure also affords convenient methods for pleading guilty to a charge and thus get out of the lingering process of a long criminal trial.[24] All these factors amply suggest that in practice the courts, while assuming to follow a procedure already known and used by the courts, have evolved an inquisitorial mode of inquiring into the guilt or innocence of the child of the young offender. No doubt the underlying idea in disposing of these cases by the court is to rescue the child offenders from being unduly exposed to the processes of criminal trial. The practices followed by the courts in the trial of these young offenders need a closer study, and if the practice are found to be useful and workable these may be given the proper seal of legality through a legislative enactment. It is mere hypocrisy to adopt an inquisitorial procedure under the cover of a procedure prescribed for the summon trial under the Code of Criminal Procedure.

A defect which largely pervades this type of inquiry and trial is that the procedure may vary from court to court because the court is not bound to follow a prescribed procedure, but the essentials of a procedure. Another defect which largely looms in this method of trial is that the child or the young offender is practically without the necessary legal aid. In most of the cases the police brings the offender to the court and the court invokes its jurisdiction to inquire and dispose off the case by itself making necessary inquiries from the offender, and it is not surprising that in a majority of cases expediency may require the court to elicit a guilty plea and it may also dictate the accused to plead it too. The absence of a counsel is also helpful in making a plea of guilty unwillingly on the part of the accused.

Notwithstanding these defects it may be suggested that and trial of child offenders a different procedure may by prescribed for the inquiry. As stated in section 39 of the Children Act, 1960 the procedure to be followed be that of the summons cases to the extent it is possible, can be a good guide to follow. The need is to streamline it and spell it out legislatively in clear rules. As suggested above a study of the prevailing practices and procedures in various children's court would provide an answer to the possible pattern of procedure to be used for trial of the young offenders. This would help eliminating different standards by different courts. There is no harm in the court acting in an inquisitorial fashion to

23. S. 251, Code of Criminal Procedure, 1973.
24. *Id.*, ss.252-253.

elicit the truth of the matter. In order to safeguard the minimum right of the child offender, which he is entitled to even as an accused it is suggested that an effective legal assistance be made readily available to him through a law trained social worker who should be attached to the children courts.

Disposal of the case

Once the adjudicatory process of determining the guilt or innocence is over, the criminal proceeding steps into the arena of punishment if the person is found to have committed the offence. In accordance with the existing policy and the law the punishment of these offenders have to be considered in a different light. Presently, the law in this regard takes various forms and looking to the appropriateness of each case, the court has to impose the sentence fitted to it. The law relating to these punishments is discussed herein below.

Imprisonment

Now a days the punishment of imprisonment is sparingly prescribed for the young offenders. It is in conformity with changes in the penal policy as reflected through other laws enacted for the purposes of children and the young offenders.[25] A situation when imprisonment of the young offender is prescribed under the law is the one where he is convicted of an offence punishable with imprisonment for life. In other cases the law seeks to prescribe alternative modes of punishment which aim at the reformation, education and rehabilitation of the offender. These substitutes of punishment remain valid only in cases of the first offenders who are below the age of twenty one years. Such offenders who repeat the offence lose the benefit and can be imprisoned. Although the Probation of Offenders Act, 1958 does not state clearly that the benefit of sparing the prison for the young offender below the age of twenty one years is not meant for the repeater, nonetheless it provides a good ground for the court to act under section 6 (2) of the Act to award the sentence of imprisonment to him. It is, however, possible to detain such offenders in Borstal institution in the states where such institutions exist.

Fine

It is likely that offences mostly indulged by juveniles and young offenders may attract this kind of punishment. The law relating to the levy of fines may assume either the form of recovery of fine by issuing a warrant for attachment and sale of any movable property belonging to the offender, or to realise the amount of fine as arrears of land revenue from the property of the defaulter or the court may itself direct

25. S. 360, Code of Criminal Procedure, 1973; s. 6, Probation of Offenders Act, 1958.

that in default of payment of the fine the offender shall be imprisoned[26]

The levy of fine as a mode of punishment does hardly affect the child offender or the young offender. It is invariably, the parent or the guardian who has to come forward with the money to put this punishment to an end by paying the amount. The material effect of imposing this penalty is that the stigma of punishment is carried by the child offender. In order to avoid this situation the law expressly requires that offences punishable with fine in cases of the first offenders blow the age of twenty one years be substituted with the release on probation of good conduct or be released after the admonition is administered.[27]

Probation

The young offenders below the age of twenty one years are entitled to a lenient treatment as compared to the adult ones, once the guilt is proved. According to the Code of Criminal Procedure, 1973 a beneficient purpose is sought to be achieved by providing for the release of first offenders below the age of twenty one years who are convicted of an offence punishable with fine or with imprisonment for a term of seven years.[28] The Code, however, widens the scope by also providing that :

> Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958) the Children Act 1960 (60 of 1960) or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.[29]

The Probation of Offenders Act, 1958 places restrictions on the imprisonment of these young offenders. Under section 6 (1) of the Act,

> any person under twenty one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

The power of the court under sections 3 and 4 of the Act relate to the release of offenders on admonition or on probation of good con-

26. See ss. 421-424, Code of Criminal Procedure, 1973.
27. S. 3, Probation of Offenders Act, 1958.
28. S. 360 (1), Code of Criminal Procedure, 1973.
29. *Id.*, s. 360 (1).

duct respectively. The opinion of the court, that the young offender does not deserve admonition or release on probation of good conduct, must be based on the report of the probation officer and other information available with the court relating to his character as well as his physical and mental condition.[30] Even once an opinion is formed about not releasing the offender on probation, it is difficult to exercise the option in a punitive way because the law mandatorily calls for recording reasons if it adopts a course to imprison the young offender.[31]

Thus, the sentencing policy of the state as reflected through the Probation of Offenders Act, 1958 is to bring in a change in the criminal law of the country insofar as it relates to the children and the young offenders. The basic approach is to seek reformation of the offender and the purpose of punishment is served by admonishing the young offender or to secure his release on probation. The other options open to the court, instead of imprisoning the offender, is to send the child offender to a reformatory, borstal or approved schools in accordance with the law prevailing in the respective states. As can be noted from the foregoing discussion the Code of Criminal Procedure, which governs the criminal trial adequately provides for dealing with the matters of children so as to enable them to avoid incarcenation by substituting probation for the punishment and giving them such reformatory education and treatment as are to be found in other laws like the Probation of Offenders Act, the Children Act and related enactments.

Conditional and absolute release

Recognizance by first offenders[32] and also by minors on the execution of bond by a surety or sureties has been known for long.[33] Likewise, the release of offenders in certain case for peace and good behaviour has also been provided.[34] But the Probation of Offenders Act, 1958 explicitly provides for the release of offenders instead of sentencing them.

The release can either be absolute or conditional. The former kind of release takes place only if the court opts to administer admonition to the offender.[35] Thus, admonition acts as an absolute release, but it is circumscribed by limitations. It is operative only in cases of theft, dishonest misappropriation, cheating or any other offence punishable

30. S. 6 (2), Probation of Offenders Act, 1973.
31. *Id.*, s. 6 (1).
32 S. 360, Code of Criminal Procedure, 1973.
33. *Id.*, s. 448.
34. *Id.*, s. 110.
35. S. 3, Probation of Offenders Act, 1958.

with imprisonment for not more than two years or with fine or with both. No other previous conviction is proved against the person as well.

Conditional release can be had if the person is found guilty of having committed an offence not punishable with death or imprisonment for life, and the offender is otherwise deemed fit for release on probation of good conduct instead of serving the sentence. Such an offender can secure a release on furnishing a bond, with or without sureties, conditioned by the fact that his failure to keep the peace and his failure of being of good behaviour would entail upon him the consequence of receiving a sentence. The order of conditional release must, however, precede the satisfaction of the court that the offender or his surety has a fixed place of abode or regular occupation is within the jurisdiction of the court.[36] The absence of any specific direction in the law that such an arrangement is not available to the offenders repeating the offence does imply that this mode of disposal of matters of the young and child offenders committing the offence again can well be considered for a sentence to have a desirable effect on the erring delinquents.

There is yet another form of release provided by the Probation of Offenders Act for the release of the offenders on probation of good conduct. It is in essence the modified version of the conditional release wherein all the requisites required for it are necessarily present but in addition it may seek to appoint a supervisor, who may be probation officer, and may also impose such conditions as the court deems necessary for due supervision of the offender.

36. *Id.*, s. 4 (1), (2).