Justice Md. Imman Ali

''FUNDAMENTAL RIGHTS OF CHILDREN: RIGHTS OF YOUTHFUL OFFENDERS ARE ENSURED BY THE CONSTITUTION''

Justice Md. Imman Ali

Appellate Division.

Do children have rights? The answer is too obvious. As citizens of the country they have all the rights as any other adult citizen, subject to embargos imposed by specific laws requiring attainment of majority. Article 27 of the Constitution provides, ***'All citizens are equal before law and are entitled to equal protection of law.'*** Article 31 provides, ***'To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.'*** Article 32 provides, ***'No person shall be deprived of life or personal liberty save in accordance with law.'*** But does anybody care about the rights of children? Here there might be doubts and misgivings.

Arguably children are the most vital component of our citizenry. Today's children are tomorrow's leaders, professionals, workers, or maybe, thieves, vagabonds or criminals of the highest order. But who will ensure their rights? Children are children, and have no voice. When any rights of an adult citizen are encroached or violated he immediately rushes to the Court for remedy. The child citizen is dependent on an adult to take action in his behalf, if she feels so inclined or feels sufficiently aggrieved. Equally, when an adult comes into conflict with the law, he knows how to defend himself and, more often than not, engages a lawyer to defend himself, sometimes, even before any action is taken against him. The child in conflict with the law is at the mercy of the 'system' dealing with him. Here, it is felt that the persons in authority, namely the Police, Magistrates, Judges and other officials of allied agencies, such as Probation Officers, are duty bound to ensure proper application of the law and benefits meant to accrue under such law to such children in conflict with the law. Sadly, as will be illustrated later, the 'system' as a whole is failing in its duty.

(The definitions of 'child' and 'youthful offender' can be found in section 2(f) and 2(n) respectively of the Children Act, 1974. A 'child' is a person under the age of 16 years and a 'youthful offender' means any child who has been found to have committed an offence. The term 'in conflict with the law' is generally used in a broader sense to include anyone coming into contact with someone in authority upon being accused of breaking the law.)

According to the definition found in Wikipedia, *'a fundamental right is a right that has its origin in a country's constitution or that is necessarily implied from the terms of that constitution. These fundamental rights usually encompass those rights considered natural human rights.'* Part III of our Constitution deals with Fundamental Rights. Mahmudul Islam in his book, '**Constitutional Law of Bangladesh**' writes, 'If we make a comparison of Part

III of the Constitution with the Universal Declaration of Human Rights, we shall find that most of the rights enumerated in the Declaration have found place in some form or other in Part III of the Constitution and some have been recognised in Part II.' In this context, it can safely be said that the Children Act 1974, hereinafter referred to as 'the Act', was a masterpiece of legislation, well advanced for its time, enacted to cater for the rights of children, incorporating the multifarious beneficent Declarations, Conventions and other international treaties, for the betterment of the children-kind.

In a relatively recent decision of the High Court Division presided by the author, sitting with Mr. Justice A.K.M. Fazlur Rahman, in **The State Vs. Md. Roushan Mondal @ Hashem** it was observed as follows:

'We believe that the Children Act 1974 was promulgated as a direct manifestation of Article 28(4) of the Constitution, which has been placed in the Part III under the title **"Fundamental Rights",** and at the same time in response to, and with a view to fulfilling the mandate of, the relevant international instruments of the UN mentioned above. Article 28(4) of the Constitution provides as follows:

"Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens."

Thus the framers of the Constitution have given the power even to promulgate discriminatory laws favouring the womenfolk and children. Hence it can be said that the Act is a beneficent legislation purposely enacted to give beneficial effects to a particular community of women and children and once enacted the rights which accrue cannot be frittered away by subsequent enactment.

[2nd Edition, page 88] [BCR 2006 HCD 275]

In a recent Jail Appeal for admission, placed before a Division Bench of the High Court Division presided by the author, sitting with Mr. Justice Md. Fazlur Rahman, the following order was passed on 6.9.2007:

'While admitting this appeal it has come to our notice that the appellant was about 14 years old at the time of commission of the offence and 15 to 15½ years old at the time of framing of the charge and, accordingly, the case was split up and dealt with separately from other co-accused who were adults. The appellant has been in jail from the date of his arrest on 20.8.98. In view of such facts, we cannot but make our observations with regard to the numerous irregularities and illegalities apparent on the face of the records, which have been committed from the time of arrest of this appellant to the time of conclusion of the trial.

[Jail Appeal No. 552 of 2004]

There are certain formalities and legal provisions which are to be observed when the alleged offender is a child and these are incorporated in the Children Act, 1974 (hereinafter referred to as the Act):

1. As soon as a child is brought before the authorities, i.e. the police, with an allegation of an offence, the police are under a duty to enlarge the offender on bail pursuant to section 48 of the Act which provides as follows:

> *48. Bail of child arrested: Where a person apparently under the age of sixteen years is arrested on a charge of a non-bailable offence and cannot be brought forthwith before a Court, the officer-in-charge of the police station to which such person is brought may release him on bail, if sufficient security is forthcoming, but shall not do*

so where the release of the person shall bring him into association with any reputed criminal or expose him to moral danger or where his release would defeat the ends of justice.

If the officer-in-charge of the police station does not grant bail to the child offender then he is to the follow the provisions of section 49 of the Act which provides as follows:

49. Custody of child not enlarged on bail: (1) Where a person apparently under the age of sixteen years having been arrested is not released under section 48, the officer-in-charge of the police-station shall cause him to be detained in a remand home or a place of safety until he can be brought before a Court.

(2) A Court, on remanding for trial a child who is not released on bail, shall order him to be detained in a remand home or a place of safety.

In the instant case it appears that the appellant was from the beginning kept in jail and taken on police remand. There is also a further duty cast upon the police by section 50 of the Act which provides as follows:

50. Submission of information to Probation Officer by police after arrest: Immediately after the arrest of a child, it shall be the duty of the police-officer, or any other person affecting the arrest to inform the Probation Officer of such arrest in order to enable the said Probation Officer to proceed forthwith in obtaining information regarding his antecedents and family history and other material circumstances likely to assist the Court in making its order.

From the records before us, we find that the police have failed to observe the requirements of law as provided by sections 48, 49 and 50 of the Act.

2. As soon as a child is brought before any Court a duty is cast by the Act upon the Court by section 66 which provides as follows:

66. Presumption and determination of age: *(1) Whenever a person whether charged with an offence or not, is brought before any criminal Court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child, the Court shall make an inquiry as to the age of that person and, for that purpose, shall take such evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age as nearly as may be.*

(2) An order or judgment of the Court shall not be invalidated by any subsequent proof that the age of such person has not been correctly stated by the Court, and the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purposes of this Act be deemed to be the true age of that person and where it appears to the Court that the person so brought before it is of the age of sixteen years or upwards, the person shall, for the purpose of this Act, be deemed not to be a child.

It is therefore incumbent upon the Magistrate before whom the child offender was first produced to ascertain his age, if it appears to the Court that he is a child. When the appellant was first produced before the Magistrate he was 14 years old. Therefore, the Magistrate failed in his duty to ascertain that the offender was a child before sending him to jail and the case to the Court of Sessions for trial.

3. When the learned Sessions Judge received the case record, it having been forwarded to him by the Magistrate, he was under the same duty cast upon him by the provisions of section 66 to ascertain the age of the child. It appears that the learned Judge failed in his duty

and sent the matter to the learned Magistrate for assessment of the age of the child offender. Quite clearly, the duty is cast upon the Court, in this case the learned Sessions Judge since he is in seisin of the matter, to make the inquiry himself and to "take such evidence as may be forthcoming at the hearing of the case" and to "record a finding thereon, stating his age as nearly as may be." But rather than comply with the provisions of law himself, the learned Sessions Judge erroneously sent the matter to the Magistrate. The latter also did not follow the provisions of section 66 of the Act. It appears from the record of the Magistrate's Court that several attempts were made by the Magistrate to obtain an age assessment for the child offender, but no cooperation was received from the Civil Surgeon or the police authorities in this respect. Ultimately, the Magistrate directed the officer-in-charge of the police station to conduct inquires in order to ascertain the age. Finally, a supplementary charge sheet was submitted by the officer-in-charge of Chakoria Police Station dated 21.1.2000, wherein the offender was said to be aged between 15 and 15 ½ years. Accordingly, the report was thereafter forwarded to the Court of Sessions and the matter was transferred to the learned Additional Sessions Judge for trial and disposal.

4. The allegations against the child being of an offence triable exclusively by the Court of Sessions, the trial was to be held before the Court of Sessions, as provided by section 5(3) of the Act, "*in accordance with the procedure laid down in this Act."* We are not aware from the records as to what form the trial took, whether it was in accordance with the provisions of the Children Act vis-à-vis the requirement to have trial in a separate building or different room from that in which the ordinary sittings of the Court are held as required under section 7 of the Act, which provides as follows:

> *7. Sittings, etc. of Juvenile Courts: (1) A Juvenile Court shall hold its sittings at such place, on such days and in such manner as may be prescribed.*
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> *(2) In the trial of a case in which a child is charged with an offence a Court shall, as far as may be practicable, sit in a building or room different from that in which the ordinary sittings of the Court are held, or on different days or at different times from those at which the ordinary sittings of the Court are held.*

From the judgment of the trial Court we find that the connected trial of the adult co-accused in S. T. Case No.97 of 1998 took place simultaneously with the trial of S.T. Case No. 48 of 2000 relating to this appellant. We note from a perusal of the original judgment delivered in the instant case by the learned Additional Sessions Judge, Cox's Bazar that S.T. Case No.97 of 1998 was heard "পাশাপাশি পৃথকভাবে" By this we understand him to mean that the two cases were heard on the same dates one after another by the same Judge sitting in the same Court room, which is a violation of the provisions of section 7, as quoted above. It further appears from an application filed by the accused dated 9.7.2005 that he was still named as an accused in S.T. Case No.97 of 1998. In the said application the appellant applied for his name to be excluded from S.T. Case No.97/98. The application was kept for hearing on the next fixed date, but no order appears subsequently.

5. Several applications were made for the bail of the accused child. Since it was by then established that the alleged offender was a child, bail should have been granted, failing which he should have been placed in a Home. It seems to have escaped the learned Judge that even the Code of Criminal Procedure gives him the discretion to grant bail to a person under sixteen as provided by the proviso to section 497 of the said Code.

6. Upon conclusion of the trial learned Additional Sessions Judge found the offender guilty under section 302 of the Penal Code and sentenced him to suffer rigorous imprisonment for life and also to pay a fine of Tk.5,000/-, in default to suffer rigorous

imprisonment for 1(one) year more. The period spent by him in custody during trial was to be deducted under the provisions of section 35A of the Code of Criminal Procedure. The finding and order portion of the judgment are exactly as one would find after the trial of a normal Sessions triable case and not one tried under the provisions of the Children Act. The learned Judge also observed that since the accused was 15½ years old at the commencement of the trial, but had attained majority by the time of delivery of judgment, there was no need to send him to any Youth Correction Institute. In passing such sentence the learned Judge has quite clearly acted in violation of section 51 and 52 of the Act. Section 51 provides as follows:

> *51. Restrictions on punishment of Child: (1) Notwithstanding anything to the contrary contained in any law, no child shall be sentenced to death, transportation or imprisonment:*
>
> *Provided that when a child is found to have committed an offence of so serious a nature that the Court is of opinion that no punishment, which under the provisions of this Act it is authorised to inflict, is sufficient or when the Court is satisfied that the child is of so unruly or of so depraved character that he cannot be committed to a certified institute and that none of the methods in which the case may legally be dealt with is suitable, the Court may sentence the child to imprisonment or order him to be detained in such place and on such conditions as it thinks fit:*
>
> *Provided further that no period of detention so ordered shall exceed the maximum period of punishment to which the child could have been sentenced for the offence committed.*
>
> *Provided further that at an any time during the period of such detention the Court may, if it thinks fit, direct that in lieu of such detention the youthful offender be kept in a certified institute until he has attained the age of eighteen years.*

It may be noted that the Children Act enacted in 1974 uses the term "transportation" which at the time was a punishment under the Penal Code but has since been amended by Ordinance XLI of 1985 to "imprisonment for life." The Act further provides the confines within which sentence may be awarded, in section 52 of the Act, which provides as follows:

> *52. Commitment of child to certified institute: Where a child is convicted of an offence punishable with death, transportation or imprisonment, the Court may, if it considers expedient so to deal with the child, order him to be committed to a certified institute for detention for a period which shall be not less than two and not more than ten years, but not in any case extending beyond the time when the child will attain the age of eighteen years.*

Thus it appears that even in a case of an offence punishable with death, imprisonment for life or other imprisonment the Court may award sentence of not less than 2 years and not more than 10 years to a youthful offender. However, the proviso to section 51 allows the Court to award a sentence of imprisonment and for the child to be kept in a place other than a certified institute if the Court is satisfied that the child is of so unruly or of so depraved character that he cannot be committed to a certified institute. Thus sentence under section 52 is the norm and one under section 51 would be an exception when certain conditions apply. And even then if the Judge is satisfied with the conditions detailed in the proviso to section 51, then only may he award the sentence of imprisonment upon the youthful offender with the direction that he shall not be allowed to associate with adult offenders as provided by section 51 (2) of the Act. It should be noted that the first proviso allows the Court to sentence a child to imprisonment when the specified conditions are satisfied. But it does not permit the Court to sentence a child to transportation, i.e. imprisonment for life. Thus the sentence of

imprisonment for life is patently illegal. Moreover there is no provision within the Children Act to impose a fine.

We acknowledge our appreciation for the assistance given to us by Dr. Shahdin Malik and Mrs. Fahima Nasrin, the learned advocates who went through the lower Court's records and also apprised us of the provisions of the Children Act. We also note the submissions of Mr. Mohammad Ali Akanda, the learned Deputy Attorney General who submits that from the records it does not appear that the trial was illegal since the learned Judge dealt with the child offender separately from the adult co-accused as required by the Children Act. However, he conceded that there appeared to have been certain irregularities in the procedure.

We can only say at this stage that it is apparent on the face of the record that the provisions of the Children Act have not been complied with at the various stages in the proceedings and also that the appellant has already suffered more than 9 (nine) years of imprisonment in a regular jail with other adult offenders, which he certainly should not have suffered, particularly during the time of his trial. The period spent by him in custody from the time of his arrest to the time of the judgment was clearly in violation of the Children Act and in such view of the matter we are inclined to enlarge the appellant on bail till disposal of the appeal.

Accordingly, let Jafor Alam, son of Abdul Jalil be enlarged on bail till disposal of the appeal subject to furnishing sufficient security to the satisfaction of the Deputy Commissioner, Cox's Bazar.

Let a copy of this order be transmitted to the Ministry of Law, Justice and Parliamentary Affairs, Ministry of Home Affairs, Ministry of Establishment, Cabinet Division, Ministry of Women and Children Affairs, Inspector General of Police, and all the District Judges within Bangladesh for taking appropriate steps to ensure that the various departments and officials concerned are made aware of the provisions of the Children Act and that such lapses do not recur. All who come into contact with children as offenders or otherwise must know and implement the provisions of the Children Act, 1974. After 33 years of the Act coming into force, there is no excuse for such dismal failure on the part of those who are entrusted with the proper dispensation of justice in accordance with law.

Let a copy of this order also be communicated to the learned **trial Judge.'**

This case illustrates how the 'system' has failed at the various stages of the proceedings to give due benefits of the statute accruing to the child in conflict with the law who was ultimately convicted under section 302 of the Penal Code and sentenced to suffer imprisonment for life and also to pay a fine of Tk.5,000/-, in default to suffer rigorous imprisonment for 1(one) year more. In the course of the process from arrest to trial and during the course of trial, which culminated in the conviction and sentence, the provisions of Articles 27, 31 and 32 of the Constitution have been infringed due to non-application of the provisions of the Children Act 1974. The appellant was not dealt with under due process of law. It cannot be denied that such dealings, as discussed above, by those in authority, or the failure to follow procedures laid down by the law and rules, are not uncommon. We have come across many cases where due process of law has not been followed, when dealing with children.

At this juncture it would not be out of place to advert to one other issue which has been a bone of contention in the past. In cases brought under any special law, children have been tried by Special Tribunals. In ***State vs Sukur Ali*** a 14 year old child was convicted by the Nari-o-Shishu Nirjatan Daman Bishesh Adalat under section 6(2) of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 and was sentenced to death. A Division Bench of the

High Court upheld the conviction and sentence on the ground that section 3 of the relevant law has an overriding effect and the provisions of this law would prevail over other laws, including the Children Act. In this regard it was observed in the ***Md. Roushan Mondal*** case, cited above, that **'.....juveniles charged with offences falling under special law will have to be dealt with by the Juvenile Court in accordance with provisions of the Children Act, which, in our view, is of universal application and approach, irrespective of the offence alleged....'** Support was gathered from the Indian decision in ***In re: Sessions Judge, Kalpetta, 1995 Cri. L.J. 330***, where the Court after deliberation reasoned that the 1989 Act [the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, which has a non-obstante clause similar to section 3 of our Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995] aims at giving protection to the Scheduled Caste and Scheduled Tribe communities against whom atrocities are being committed. The Act was concerned with victims of the crimes and not the offenders. In their lordships' view the overriding power given by section 20 of the Act cannot be extended to nullify the provisions contained in the 1986 Act [the Juvenile Justice Act, 1986]. Their lordships concluded, "… it can safely be concluded that Parliament totally excluded the jurisdiction of ordinary courts in relation to juvenile offenders. In other words, jurisdiction of all other courts established under law is ousted and it is solely conferred on Juvenile Courts in so far as juvenile offenders are concerned." Similarly, in our country the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 and other similar special laws were enacted with a view to protecting the victims, whereas the relevant sections of the Children Act, 1974 were enacted for the benefit of the child offender.

[9 BLC (HCD) 2381]

If one applies the doctrine of mischief, i.e. the purpose for which the law was enacted, then one cannot avoid the conclusion that where the allegation involves a child in conflict with the law then the provisions of the Children Act will prevail. The matter has now been clarified by the Nari-o-Shishu Nirjatan Daman Ain, 2000, repealing the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, which is considered as a remedial legislation. In the new law section 20(7) provides that, 'if a child is accused of committing an offence under this law, or is a witness of such an offence, then, so far as possible, the provisions of the Children Act, 1974 shall be followed.'

Hence, it must be concluded that the matters described above, are a failure of the system to ensure the inalienable universal rights of the child-citizen, given by statute enacted to enforce the fundamental rights recognised by the Constitution. In the above example, (**Jail Appeal No.552 of 2004)** the system has failed to give the child offender his due benefits by way of bail, services of a Probation Officer, confinement in a place other than a prison and trial in an appropriate Court following the law and rules duly enacted in this regard, i.e. the Children Act 1974 and the Children Rules 1976. That law and the Rules having been specifically enacted for a particular class of citizens, it is the fundamental right of anyone falling within that category to receive treatment as provided by that law. The matter being *sub-judice*, I shall refrain from commenting on the legality or otherwise of the sentence awarded, in the facts of the case mentioned above.

(‘’Section 20 of the 1989 Act states that save as otherwise provided in the Act, the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force….)

i.e. Nari-o-Shishu Nirjatan Daman Ain, 2000 (XXXIX of 1974)

More than thirty-three years have elapsed since the enactment of the Children Act 1974, yet we find many persons concerned with and responsible for the operation of the law to be oblivious of the provisions of the law thus enacted. It cannot be overemphasised that it is our bounden duty and in our greater interest to look after the well-being of our children for our prosperous and peaceful future. We are duty bound to enforce the law and to administer the rights ensured by legislation and to grant benefits accruing there from, whenever and wherever it is due. Justice is to be ensured by due process of law. Children too have a right to be dealt with in accordance with law, i.e. the provisions of the Act, and thereby in conformity with the mandate of the Constitution. The law was purposefully enacted for the benefit of that class, giving them specific rights, overriding the non-discrimination clause in the Constitution. We should not allow such rights to be frittered away.
