Reserved

HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW

CRIMINAL APPEAL No. - 1380 of 2012

Manish Kumar

…..Appellant(s)

Versus

State of U.P.

…..Respondent(s)

Counsel for Appellant(s)	:	R.n.s. Chauhan,
Counsel for Respondent(s)	:	Govt. Advocate,

Court No. - 14

HON'BLE RAJEEV SINGH, J.

1. Heard learned counsel for the appellant and the learned A.G.A. for the State.

2. The present appeal has been preferred against the judgment and order dated 24.9.2012 passed by the Additional Sessions Judge (Ex-Cadre), Unnao in Session Trial No. 452 of 2011, arising out of Case Crime No.781 of 2011, relating to the Police Station Asiwan, District Unnao, convicting the appellant under Section 366 I.P.C. for a period of three years R.I. with fine of Rs.5000/-, in default of which, additional rigorous imprisonment of one year.

3. Learned counsel for the accused-appellant submits that appellant has not been convicted previously for any offence. Learned counsel for the accused-appellant, at the outset, submits that he is not challenging the impugned judgment and order of

conviction and he is confining his submission in the appeal only with respect to the order of sentence.

4. In view of the aforesaid submission of learned counsel for the accused-appellant, the appeal is dismissed so far as it relates to the impugned judgment and order of conviction passed by the court below. The judgment and order of conviction passed by the court below dated 24.9.2012 is hereby, upheld.

5. Learned counsel for accused-appellant submits that in view of the aforesaid facts and circumstances including the fact that the appellant has not been convicted previously for any offence, the trial court ought to have invoked the provisions of The Probation of Offenders Act, 1958 (hereinafter referred to as 'Act, 1958'). It is further submitted that the court below neither invoked the provisions of the Act, 1958 nor the provisions of Section 360 Cr.P.C., while sentencing the accused-appellants. The court below has also not given any special reason in the impugned judgment and order of conviction and sentence for not giving the benefit of provisions of Section 360 Cr.P.C. or the provisions of Act, 1958.

Section 361 of the Code is required to be applied with or without the beneficial provisions, i.e., Section 360 of the Code or the provisions of the Act, 1958. If the Court chooses not to apply either of these provisions, it is required to give special reasons for not applying the beneficial provision in case the accused offender otherwise, is eligible for provisions of Section 360 of the Code or Section 3 or 4 of the Act,1958.

6. Learned counsel for the appellant vehemently submits that the accused-appellant have statutory right for claiming the benefit of beneficial legislation, i.e., the provisions of the Act, 1958 and the court below was under a duty to consider the applicability of Section 360 Cr.P.C. or Sections 3 or 4 of the Act, 1958 as mandated under Section 361 Cr.P.C. If the provisions of Section 360 Cr.P.C. or provisions of the Act, 1958 were not applied, then the court below should have recorded reasons for the same. It is, thus, submitted that to that extent, the impugned judgment and order suffers from serious illegality being violative of provisions of section 361 Cr.P.C. and, therefore, it cannot be sustained.

7. Learned A.G.A. appearing for the State fairly concedes the fact that accused-appellant is the first time offender and was not previously convicted in any other case. He also submits that in view of the express provisions of Section 361 Cr.P.C., considering the facts and circumstances; nature of the offence; the character of the appellant, and particularly, the time period, which has lapsed since the date of incident, the benefit of Section 4 of the Act, 1958 can be granted in this case.

8. I have considered the arguments advanced by the learned counsel for the appellant as well as learned A.G.A. and gone through the record.

9. Section 360 and 361 of the Code of Criminal Procedure are relevant for the purpose of probation to first offenders. Both these sections are reproduced as under:-

> "360. Order to release on probation of good conduct or after admonition.(1) When any person not under twenty-one years of

age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years, imprisonment or any offence punishable

with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or 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.

361. Special reasons to be recorded in certain cases.-Where in any case the Court could have dealt with.?(a) an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958); or (b) a youthful offender under 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, 135 but has not done so, it shall record in its judgment the special reasons for not having done so."

10. There is one central Legislation on the subject in the name of **"Probation of Offenders Act, 1958"**, relevant Sections 3 and 4 thereof are extracted hereunder:-

"3. Power of court to release certain offenders after admonition.When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything

contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition.

Explanation. For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4.

4. Power of court to release certain offenders on probation of good conduct. (1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour: Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a

probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

11. There is one more legislation on the subject namely **"Uttar Pradesh First Offenders' Probation Act, 1938"**. Sections 3 and 4 of the Act are reproduced herein below:-

"3. Power of court to release certain offenders after admonition.? In any case in which a person is found guilty of the offences of theft, dishonesty, misappropriation or cheating, punishable under the Indian Penal Code, or of any offence punishable with not more than two years imprisonment and no previous conviction is proved against him, the court by which he is found guilty may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender, and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed instead of sentencing him to any punishment, release him after due admonition.

4. Power of court to release certain offenders on probation of good conduct. (1) When any person is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the court before which he is convicted, regard being had to the age, character, antecedents or physical or mental condition of the offender and to the circumstances in which the offence was committed that it is expedient that the offender should be released on probation of good conduct the court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not exceeding three years as the court may direct and in the meantime to keep the peace and be of good behaviour :

Provided that the court shall not direct the release of an offender under this section unless it is satisfied that the offender, or his surety, has a fixed place of abode and regular occupation in the place for which the court acts, or in which the offender is likely to live during the period named for the observance of the conditions :

Provided also that if a person under twenty-one years of age is convicted of any offence under the Indian Penal Code, or any other enactments prescribed in this behalf under rules made by the State Government, which is punishable with imprisonment not exceeding six months, the court shall take action under this section unless, for special reasons to be recorded in writing, it does not consider it proper to do so.

(2) Where the offender ordered to be released under sub-section (1) is under twenty-four years of age, the court may make a supervision order directing that such offender shall be under the supervision of such probation officer as may be named in the order during the period specified therein and imposing such other conditions for securing such supervision as may be specified in the order:

Provided that the period so specified shall not extend beyond the date on which, in the opinion of the court, the offender will attain the age of twenty-five years.

(3) A court making an order under sub-section (2) shall require the offender, before he is released to enter into a bond, with or without sureties, to observe the condition with respect to residence, abstention from intoxicants and any other matters as the court may, having regard to the particular circumstances of the case, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(4) A court making an order under sub-section (2) shall furnish to the offender and the sureties, if any, a notice in writing stating in simple terms the conditions of the bond.

A perusal of these legislation will leave a student of Law in a confused state of mind. All these legislations are dealing with the same subject and on first sight looks encroaching each other. Looking closely, one may get that Section 360 of the Code relates only to persons not under twenty one years of age is convicted for an offence punishable with fine or with imprisonment for a term of seven years or less, or when any person under twenty one years of age or any woman is convicted for an offence not punishable with death or imprisonment for life, and no previous conviction is proved, may be released on probation, taking into consideration the facts and circumstances of the case, character of the offender and the gravity of the offence committed by him. Section 4 of the Probation of Offenders Act is having a much wider scope as it applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. If I look further deep into Section 360 CrPC we will find that in sub-section (10) it has been provided that nothing in this section shall affect the provisions of the Probation of Offenders Act."

12. A Division Bench of this Court in **State of Uttar Pradesh Vs. Misri Lal and others, 1982 CrLJ 1420** held as under:-

"26. ...The application of Section 360 in Utter Pradesh was taken away by an Ordinance of the year 1975. The Ordinance was repealed and replaced by the Criminal P.C. (Uttar Pradesh Amendment) Act, No. 16 of 1976. This Act received the assent of the President on 30-4-1975 and published in the Utter Pradesh Extraordinary Gazette dated 1-5-1976. Section 12 of this Act repealed the Ordinance and laid down that notwithstanding such repeal, anything done or any action taken under the Ordinance shall be deemed to have been done or taken under the provisions of this Act as if this Act had come into force on November, 28, 1975. The learned trial judge decided the case on 2-2-1976. Section 10 of the Amending Act No. 16 of 1976 amended S.484 of the Code and inserted the following clause (e) after clause (d) :-

"(e) ...the United Provinces First Offenders' Probation Act 1938.....shall continue in force in the State of Uttar Pradesh .... and accordingly the provisions of Section 360 of this Code shall not apply to that State and the provisions of Section 361 shall apply with the substitution or reference to the Central Acts named therein by references to the corresponding Act in force in that State".

Section 361 of the CrPC lays down that where in any case the Court could have dealt with an accused person under Section 360 or under the provisions of the Probation of Offenders Act, 1958, or a youthful offender under the Children Act, 1960 or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgement the special reasons for not having done so.

It follows from this provision read with clause (e) of S.484 mentioned above, the Court is required to record special reasons for not extending the benefit of the provisions of the Utter Pradesh First Offenders' Probation Act, 1938."

13. Thus, provisions of U.P. Probation of First Offenders' Act shall be followed, in the geographical area where that has

been made applicable and not Section 360 of the CrPC. In this way enforcement of Probation Act in some particular area, thus excludes the applicability of the provisions of Section 360 of the Code in that particular area, however, it will be the bounden duty of the Court to consider as to why not to proceed to grant the benefit of Probation of Offenders Act, as provided under Section 361 of the CrPC.

14. Coming to the point of desirability of extending the benefit of Probation Act to the accused-appellant, in **Sitaram Paswan and another Vs. State of Bihar, AIR 2005 SC 3534**, Hon'ble Supreme Court held as under:-

> "For exercising the power which is discretionary, the Court has to consider circumstances of the case, the nature of the offence and the character of the offender. While considering the nature of the offence, the Court must take a realistic view of the gravity of the offence, the impact which the offence had on the victim. The benefit available to the accused under Section 4 of the Probation of Offenders Act is subject to the limitation embodied in the provisions and the word "may" clearly indicates that the discretion vests with the Court whether to release the offender in exercise of the powers under Section 3 or 4 of the Probation of Offenders Act, having regard to the nature of the offence and the character of the offender and overall circumstances of the case. The powers under Section 4 of the Probation of Offenders Act vest with the Court when any person is found guilty of the offence committed, not punishable with death or imprisonment for life. This power can be exercised by the Courts while finding the person guilty and if the Court thinks that having regard to the circumstances of the case, including the nature of the offence and the character of the offender, benefit should be extended to the accused, the power can be exercised by the Court even at the appellate or revisional stage and also by this Court while hearing appeal under Article 136 of the Constitution of India."

15. In **Mohd. Hashim Vs. State of U.P and others, AIR 2017 SC 660**, Hon'ble Supreme Court opined as under:-

> "20. ...In Rattan Lal v. State of Punjab AIR 1965 SC 444. Subba Rao, J., speaking for the majority, opined thus:-
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> "The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. Broadly stated, the Act distinguishes offenders below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them 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 offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act."

16. Admittedly, the incident took place way back in the year 2011 and the accused-appellant have suffered in the matter for past about one decade and there is no other pre or post criminal antecedent of the accused appellant. Therefore, it would not be appropriate to send the appellant in jail.

17. So far as the conviction part is concerned, this Court does not find any illegality, perversity or infirmity in the order passed by the courts below, but keeping in view the discussion made above, the sentence inflicted on the accused-appellant requires modification.

18. The appeal is partly **allowed** with following modifications:-

18.1. The conviction of the accused-appellant by courts below is upheld. The sentence of appellant-accused is modified to the tune that he is provided benefit of Section 4 of the U.P. Probation of Offenders Act and is released on probation on the condition that he will keep peace and good conduct for one year from today and shall file two sureties to the tune of Rs.30,000/- each along with his personal bond before the court below and also an undertaking to the effect that he shall maintain peace and good behavior during the period of one year from today. In case of breach of any of the conditions mentioned above, the appellant will be subjected to undergo the sentence as directed by the courts below. The bonds aforesaid will be filed by the appellant within one month from today before the District Probation Officer, Unnao under the intimation to the concerned court.

19. A certified copy of the order be also sent to the court concerned and District Probation Officer, Unnao for necessary compliance, forthwith.

(Rajeev Singh,J.)

January 30, 2026
Gaurav

Digitally signed by :-
GAURAV PAL
High Court of Judicature at Allahabad,
Lucknow Bench