

Before M. M. Punchhi, J.

STATE OF PUNJAB,—Appellant.

versus

HARBANS LAL,—Respondent.

Criminal Appeal No. 304-S.B. of 1980.

August 6, 1982.

Code of Criminal Procedure (II of 1974)—Sections 360 and 361—Probation of Offenders Act (XX of 1958)—Sections 5(2) and 19—Accused convicted of an offence and released on probation under section 360 of the Code and also required to pay fine under section 5(2) of the Act—Provisions of the Act applicable in the area where the offence was committed—Order under section 360 of the Code—Whether could be legally passed by the Magistrate in that area—Beneficial provisions of section 360 of the Code and those of the Act—Distinction.

Held, that there are some distinctive features in the beneficial provisions of section 360 of the Code of Criminal Procedure, 1973 and the Probation of Offenders Act, 1958. The provisions of the Code are of universal application but where the State Government has by a notification made applicable the provisions of the Act, the employment of section 360 of the Code in that area cannot be made and an order requiring a bond to be executed under section 360 of the Code is, therefore, illegal and uncalled for.

(Paras 8 and 12).

Held, that the spirit of the legislation is that the twin beneficial provisions should alternatively be available to every court be it whether in the form of section 360 of the Code or in the form of the provisions of the Act. The broad distinctive features of these two beneficial provisions are:

- (i) The Act is operative in specified areas, but the Code is of universal application in the country. Where the Act is applicable, the provisions of section 360 of the Code of Criminal Procedure, by virtue of section 19 of the Act, cease to apply;
- (ii) Specific areas are chosen by the State Government to the applicability of the Act having regard to the social, economic and political conditions of its population as also their character, moral fibre, law awareness, educational facilities, employment opportunities, developmental conditions, mobility and such like factors, the list being not

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exhaustive. These and other considerations noticeably weigh with the State government when it brings an area under the provisions of the Act, for it tends to be more reformatory in character as compared to the Code;

- (iii) Under section 360 of the Code, release on probation is dependant on there being no previous conviction against the offender. There is no such bar under the Act; for offenders can be released under sections 4 and 6 despite previous convictions. The case of release after due admonition of the offender is at a different footing both under section 360 of the Code and section 3 of the Act, where previous conviction of the offender is a bar to release him after due admonition. The explanation to section 3 of the Act circumscribes that for the purpose of that section, previous conviction of the person shall include any previous order made under section 3 or section 4 of the Act.
- (iv) The conviction or convictions for which the offenders are released on probation of good conduct under the Act does not attract any disqualification. Section 12 of the act is a pointer in that direction providing that notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offender under such law. The only exception to the rule is when a person after release under section 4 is subsequently sentenced for the original offence. In that case the dormant conviction comes to activity and section 12 of the Act is not applicable. On the other hand order of release on probation of good conduct under section 360, Code of Criminal Procedure does not remove the disqualifications attaching to a conviction and there is no provision like section 12 of the Act in the Code.
- (v) Section 5 of the Act authorises the Court to require a released Offender to pay compensation and costs. That compensation is payable for loss or injury caused to any person by the commission of the offence, as also costs of the proceedings may be assessed and imposed. These ancillary orders are part and parcel of the frame work of probation under the Act. On the other hand on releasing a person under section 360 of the Code of Criminal Procedure the court cannot ask the offender to pay the expenses properly incurred for the prosecution or to pay any compensation for any loss or injury caused by an offence. These orders can only be passed if the Court imposes a substantive sentence of fine. In the

absence thereof orders as envisaged under section 357 cannot be passed. In other words when section 360 of the Code has been applied, Section 357 would be rendered inoperative; whether it be a case of sub-section 1 or sub-section 3 thereof. Under the latter sub-section the Court when imposing a sentence, of which fine does not find a part, can pass an order requiring the accused person to pay compensation of such amount to the person who has suffered any loss or injury by reason of his act for which he has been so sentenced.

- (vi) Under section 6 of the Act, the Court is restricted from sentencing any person to imprisonment who is less than 21 years of age, found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life). It can only do so if having regard to the circumstances of the case including the nature of the offence and character of the offender, it would not be desirable to deal with him under section 3 or section 4 of the Act. And if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so. For releasing of an offender it need not send for the report of the Probation Officer, but when it tentatively holds a view that he should not be so released then sub-section (2) of section 6 of the Act makes it incumbent upon the Court to call a report from the Probation Officer and consider it. Besides that the Court can have other information available to it relating to the character, and physical and mental condition of the offender. If it chooses to release an offender on probation, it can set some conditions, and insert additional conditions, under section 8 of the Act. On the other hand the power under section 360 of the Code does not per se make it obligatory on the court to release an offender under 21 years of age. But sections 360 and 361 of the Code put the operation of release at the discretion of the Court and in case it is adverse to the offender the Court has only to supply special reasons for it.
- (vii) The Court under the Act has the benefit of the aid of the Probation Officers operative in the field. Section 14 of the Act provides the duties of the Probation Officers, and one of them is to supervise the probationers and the persons placed under their supervision, as also to make them to endeavour to find them suitable employment. No such facility is available to the Court under section 360 of the Code of Criminal Procedure. The reason is obvious; for where the Act is operative the brood of Probation Officers are available, to carry out the purposes of

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the Act, to advise the Court and to assist the offenders. To confer such facility on a particular area, the State government has to apply its mind objectively, having regard to the peculiar nature of the defined area to be brought under the Act. On the other hand the Code does not provide for any such machinery.

(Para 11).

Appeal for the enhancement of sentence against the order of the Court of Shri Gurdev Singh, P.C.S. Sub-Divisional Judicial Magistrate 1st Class, Moga, dated 16th January, 1980, ordering the accused to be released on probation under section 360 Cr. P.C. on his furnishing personal bond in the sum of Rs. 1,000 with one surety in the like amount for one year to keep peace, be of good behaviour and to appear in Court to receive sentence as and when called upon during the said period. The accused will also pay Rs. 400 as costs under Section 5(2) of probation of offenders Act, payable equally to both the injured persons.

S. S. Aulakh, Advocate, for A. G. Punjab.

Nemo, for the Respondent.

JUDGMENT

Madan Mohan Punchhi, J.—(Oral).

(1) These three appeals, being Criminal Appeals Nos. 304-SB, 333-SB and 334-SB of 1980, have been filed at the instance of the State of Punjab seeking enhancement of sentence. These are against three separate judgments and orders of Shri Gurdev Singh, Sub-Divisional Judicial Magistrate, 1st Class, Moga. Since a common question of law has been raised therein, it could be convenient to dispose them of by a common judgment. Yet their facts have to be separately detailed, which are done hereafter.

(2) In Criminal Appeal No. 304-SB of 1980, respondent Harbans Lal was being prosecuted for offence under section 337, Indian Penal Code, before the said Magistrate. The allegations against him were that on 24th November, 1977 he had driven his bus No. PUF-5360 rashly and negligently so as to cause hurt to two persons namely, Sukhdev Singh and Atma Singh; to the latter by striking against his tractor. Some formal prosecution evidence had been led at the trial. On 16th January, 1980, when further prosecution evidence was to be led, the respondent made an application admitting the allegations of the prosecution. The learned Sub Divisional Judicial Magistrate was satisfied that the confessional statement of the accused was voluntary and without any

pressure. He, therefore, convicted him for the offence under section 337, Indian Penal Code. On the question of sentence, he found that the accused-respondent was a first offender and was about 45 years of age. In view of the circumstances of the case and the confessional statement of the accused-respondent, he took a lenient view and ordered the respondent to be released on probation under section 360 of Code of Criminal Procedure, 1973 (hereinafter called as the New Code) on a bond operative for a term. The respondent was also required to pay Rs. 400 as costs under section 5(2) of the Probation of Offenders Act payable equally to both the injured persons.

(3) In Criminal Appeal No. 333-SB of 1980, Surjit Singh had been charged to face trial under section 25 of the Arms Act before the same Sub Divisional Judicial Magistrate. Initially he pleaded not guilty to the charge but on 15th January, 1980, the date fixed for prosecution evidence, he made a statement admitting the allegations of the prosecution. The learned Magistrate convicted the accused-respondent on being satisfied that the confessional statement was voluntary. Finding that the respondent was less than 21 years of age and a first offender as also that he had confessed his guilt, he took a lenient view and ordered the accused-respondent to be released on probation under section 360 of the New Code on a bond as envisaged therein. At the same time he required the respondent to pay Rs. 100 as costs under section 5(b) of the Probation of Offenders Act.

(4) In Criminal Appeal No. 334-SB of 1980, Surjit Singh was being tried under section 61(1)(a) of the Punjab Excise Act, 1914, before the same Sub Divisional Judicial Magistrate. On 15th January, 1980, the accused-respondent made a statement under section 313 of the New Code admitting the allegations of the prosecution to be correct and prayed for mercy. He was thus convicted of the charge. The learned Magistrate taking into account that the accused was less than 21 years of age and was a first offender and had also made a confessional statement, he ordered his release on probation under section 360 of the New Code on a bond as envisaged therein. He ordered simultaneously payment of Rs. 400 as costs to the State under section 5(b) of the Probation of Offenders Act.

(5) None of the respondents have put in appearance despite registered A.D. post-cards having been sent to them. On that

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score, the doubt which has crept in my mind with regard to the respondent being common in Criminal Appeals Nos. 333-SB and 304-SB of 1980, cannot be removed. In both cases, the learned trial Magistrate has treated the accused-respondents to be first offenders. The name and description of the respondents in both these appeals tally, but for the view I am going to take, I need not delve on this any more, but otherwise it had repercussions.

(6) As is plain, the learned Sub Divisional Judicial Magistrate employed simultaneously though in part, the provisions of the New Code and those of the Probation of Offenders Act. Learned counsel for the State contends that in District Faridkot, within which jurisdiction Moga falls, the Probation of Offenders Act 1958 had been made applicable. On that score, he contends, section 19 thereof completely effected section 360 of the New Code. He further contends that the respondents could not have been dealt with under that section at all and hence the respondents deserve to be sentenced substantively.

(7) I may mention that a similar appeal on behalf of the State of Punjab against one Rup Singh (Criminal Appeal No. 303-SB of 1980) in which the same question of law had been raised, was decided by me on July 30, 1982. Incidentally, the judgment and order under appeal in that case had also been passed by Shri Gurdev Singh, the same Sub-Divisional Judicial Magistrate, Moga. The judgment bore the date of 15th January, 1980. I did not deal with the legal question in that appeal, for I had rested the judgment mainly on merits, and also on the finding that there was a plea-bargaining between the respondent and the Court, and had held that it was within the discretion of the learned Magistrate to take into account the factors enumerated and release the respondent on probation. On the question of law I observed as follows:—

“Concededly the Court was empowered to grant probation under section 4 of the Probation of Offenders Act. And if the record has to be straightened, lest there should be any illegality, let the bond executed by the respondent deeming to be treated as one under section 4 of the Probation of Offenders Act. The period, in any case, has expired and there can be no fruitful outcome of that aspect.”

Since the question of law has persistently been raised, I might have as well answer it.

(8) There are some distinctive features found in the beneficial provisions of the Code and the Probation of Offenders Act (hereinafter referred to as the Act). Under section 562 of the Old Code, the Court had power to release certain convicted offenders on good conduct instead of sentencing them to punishment. The provision was of universal application, inclusive of the State of Punjab. Later the Act was brought on the statute book. It could only come into force in a State if the State government chose to apply it, for considerations which would be highlighted presently. The State government by notification in the official gazette could appoint a date on which the provisions of the Act would be applicable to a particular area, or to different parts of the State, and different dates could be appointed for different parts of the State for its applicability. The moment the Act applied, Section 19 came into operation which says:—

“Subject to the provisions of section 18, section 562 of the Code shall cease to apply to the States or parts thereof in which this Act is brought into force.”

(9) The Universal application of Section 562 of the Old Code, thus ceased. The Old Code has now been replaced by the New Code and the analogous provision therein is section 360 providing for release of offenders on probation of good conduct or after admonishing. The new provision now has to be read in section 19 of the Act in place of section 562 of the Old Code.

(10) It is undisputable that Moga, where these trials took place, was initially a part of Ferozepore District to which the Act was applied with effect from 1st June, 1967. Similarly, Faridkot was a part of Bhatinda District to which the Act applied with effect from 1st May, 1966. On reorganisation, Faridkot became district by itself and Moga became its part. The applicability of the Act was not at all affected. Thus, it goes without saying that the provisions of Act applied to trials at Moga and not section 360 of the Criminal Procedure Code.

(11) It is note-worthy that section 361 of the New Code of Criminal Procedure makes it incumbent upon a Court, if does not want to deal with a case of an accused person either under section 360 of the Code of Criminal Procedure or under the provisions of the Probation of Offenders Act (1958), to record special reasons in the judgment for not having done so. There was no analogous

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provision in the Old Code. The spirit of the Legislation now is that the twin beneficial provisions should alternatively be available to every Court be it whether in the form of Section 360 of the New Code or in the form of the provisions of the Act.

The broad distinctive features are these:—

- (i) The Act is operative in specified areas, but the Code is of universal application in the country. Where the Act is applicable, the provisions of section 360 of the Code of Criminal Procedure, by virtue of section 19 of the Act, cease to apply;
- (ii) Specific areas are chosen by the State Government to the applicability of the Act having regard to the social, economic and political conditions of its population as also their character, moral fibre, law awareness, educational facilities, employment opportunities, developmental conditions, mobility and such like factors, the list being not exhaustive. These and other considerations noticeably weigh with the State Government when it brings an area under the provisions of the Act, for it tends to be more reformatory in character as compared to the Code;
- (iii) Under section 360 of the Code, release on probation is dependant on there being no previous conviction against the offender. There is no such bar under the Act; for offenders can be released under sections 4 and 6 despite previous convictions. The case of release after due admonition of the offenders is at a different footing both under section 360 of the Code and section 3 of the Act, where previous conviction of the offender is a bar to release him after due admonition. The explanation to section 3 of the Act circumscribes that for the purpose of that section, previous conviction of the person shall include any previous order made under sections 3 or section 4 of the Act.
- (iv) The conviction or convictions for which the offenders are released on probation of good conduct under the Act does not attract any disqualification. Section 12 of the Act is a pointer in that direction providing that notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offender under such law. The only exception to the rule is when

a person after release under section 4 is subsequently sentenced for the original offence. In that case the dormant conviction comes to activity and section 12 of the Act is not applicable. On the other hand order of release on probation of good conduct under section 360, Code of Criminal Procedure does not remove the disqualification attaching to a conviction and there is no provision like section 12 of the Act in the Code.

- (v) Section 5 of the Act authorises the Court to require a released Offender to pay compensation and costs. That compensation is payable for loss or injury caused to any person by the commission of the offence, as also costs of the proceedings may be assessed and imposed. These ancillary orders are part and parcel of the frame work of probation under the Act. On the other hand on releasing a person under section 360 of the Code of Criminal Procedure the Court cannot ask the offender to pay the expenses properly incurred for the prosecution or to pay any compensation for any loss or injury caused by an offence. The mis-understanding in that regard has been settled by the Supreme Court in *Girdhari Lal v. State of Punjab*, (1). These orders can only be passed if the Court imposes a substantive sentence of fine. In the absence thereof orders as envisaged under section 357 cannot be passed. In other words when section 360 of the Code has been applied, Section 357 would be rendered inoperative; whether it be a case of sub-section 1 or sub-section 3 thereof. Under the latter sub-section the Court when imposing a sentence, of which fine does not find a part, can pass an order requiring the accused person to pay compensation of such amount to the person who has suffered any loss or injury by reason of his act for which he has been so sentenced.

- (vi) Under section 6 of the Act, the Court is restricted from sentencing any person to imprisonment who is less than 21 years of age, found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life). It can only do so if having regard to the circumstances of the case including the nature of the offence and character of the offender, it

(1) AIR 1982 S.C. 1229(2).

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would not be desirable to deal with him under section 3 or section 4 of the Act. And if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so. For releasing of an offender it need not send for the report of the Probation Officer, but when it tentatively holds a view that he should not be so released then sub-section (2) of section 6 of the Act makes it incumbent upon the Court to call a report from the Probation Officer and consider it. Besides that the Court can have other information available to it relating to the character, and physical and mental condition of the offender. If it chooses to release an offender, on probation, it can set some conditions, and insert additional conditions under section 8 of the Act. On the other hand the power under section 360 of the Code does not *per se* make it obligatory on the Court to release an offender under 21 years of age. But sections 360 and 361 of the Code put the operation of release at the discretion of the Court and in case it is adverse to the offender the Court has only to supply special reasons for it.

- (vii) The Court under the Act has the benefit of the aid of the Probation Officers operative in the field. Section 14 of the Act provides the duties of the Probation Officers, and one of them is to supervise the probationers and the persons placed under their supervision, as also to make them to endeavour to find them suitable employment. No such facility is available to the Court under section 360 of the Code of Criminal Procedure. The reason is obvious; for where the Act is operative the brood of Probation Officers are available to carry out the purposes of the Act, to advise the Court and to assist the offenders. To confer such facility on a particular area, the State government has to apply its mind objectively, having regard to the peculiar nature of the defined area to be brought under the Act. On the other hand the Code does not provide for any such machinery.

(12) Having drawn such distinction between the spheres of the aforesaid two provisions, it is of utmost importance that the trial Magistrates functioning in their respective areas be well in guard for the applicability of the provisions applicable for their

areas and not the other. They have to bear in mind the distinction so that where the provisions of the Act are applicable the employment of section 360 of the New Code be not made. In cases of such application, it would be an illegality resulting highly undesirable consequences, which the legislation, who gave birth both to the Act and the Code, wanted to obviate. Yet the legislature in its wisdom has obliged the Court under section 361 of the New Code to apply one or the other beneficial provisions; be it section 360 of the New Code or the provisions of the Act. It is only by providing special reasons that their applicability can be withheld by the Court. The comparative elation of the provisions of the Act are further noticed in sub-section 10 of section 360 of the New Code which makes it clear that nothing in the said section shall effect the provisions of the Probation of Offenders Act 1958. Those provisions have a paramountcy of their own in the respective areas where they are applicable.

(13) Now in dealing with the case on merits, it is plain from the record and the tenor of the judgment and orders under appeal that there were plea-bargaining between each respondent and the Court. In this situation, the learned Magistrate exercised the discretion while taking into account all those factors and released the respondents on probation.

(14) For the view I have taken on the legal question, the bond which was got executed by each respondent under section 360 of the New Code was illegal and uncalled for. All the same, the period of bond executed by each respondent has expired. I would in these cases as well, just to straighten the record, order that the respective bonds executed by the respondents deeming to be treated as those under section 4 of the Act. These are not such cases in which I would impose substantive sentences on the respondents, as prayed for. Orders of costs are legal and proper. The repetitive mode of plea-bargaining adopted by the learned Magistrate is highly deprecated, however.

(15) For the foregoing reasons, these appeals on the legal issue are technically allowed but otherwise fail as to their outcome. Ordered accordingly.