

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.553 OF 2010

SHRI SUSHIL SADANAND SAWANT)...APPELLANT

V/s.

**1) THE STATE OF MAHARASHTRA)
2) SHRI VILAS L. BHOSALE)
3) SHRI BABAN A. GARATE)
4) SMT.NALINI DATTATRAY MHAMANKAR)
5) SHRI VISHWAS DATTATRAY MHAMANKAR)
6) SHRI BAPU SHINDE)
7) SHRI A. B. SAWANT)...RESPONDENT**

Mr.G.V.Limaye, Advocate for the Appellant.

Mr.Harshad Bhadbhade, Advocate for Respondent Nos.2 to 7.

Mr.M.R.Tidke, APP for the State – Respondent No.1.

AND

CRIMINAL REVISION APPLICATION NO.353 OF 2010

**1) SHRI VILAS L. BHOSALE)
2) SHRI BABAN A. GARATE)
3) NALINI DATTATRAY MHAMANKAR)
4) SHRI VISHWAS DATTATRAY MHAMANKAR)
5) SHRI BAPU SHINDE)
6) SHRI A. B. SAWANT).....APPLICANTS**

V/s.

**1) THE STATE OF MAHARASHTRA)
2) SHRI SUSHIL SADANAND SAWANT)...RESPONDENT**

Mr.Harshad Bhadbhade, Advocate for the Applicants.

Mr.G.V.Limaye, Advocate for the Respondent No.2.

CORAM : ABHAY M. THIPSAY, J.

DATE : RESERVED ON : 7th May 2015
PRONOUNCED ON : 25th JUNE 2015

COMMON JUDGMENT :

1 This appeal and this revision can be conveniently disposed of by this common judgment and order as both arise out of one and the same criminal case.

2 Sushil Sawant – the appellant, had filed a complaint against six persons (respondent nos.2 to 7 in the appeal) alleging commission of offences punishable under Section 323 of Indian Penal Code (IPC), Section 504 IPC and Section 506 of IPC read with Section 34 IPC. After holding a trial, the Judicial Magistrate First Class, Dapoli, found all the accused guilty of offences punishable under Section 323 IPC read with Section 34 IPC and Sections 504 IPC read with Section 34 IPC. He sentenced the

accused persons to suffer Rigorous Imprisonment for 3 months and to pay a fine of Rs.1,000/- on each of the said two counts. The Magistrate also directed compensation in the sum of Rs.10,000/- to be awarded to the appellant, from out of the amount of fine. Against their conviction and the sentences imposed upon them, the accused persons (respondent nos.2 to 7 in the appeal and applicants in the revision application) approached the Court of Sessions by filing an appeal. The learned Additional Sessions Judge, who heard the appeal, came to the conclusion that the judgment and order of conviction, as recorded by the learned Magistrate was proper. He, however, was of the view that the accused persons deserved to be granted benefit of the provisions of the Probation of Offenders Act, 1958 (hereinafter 'P.O.Act' for brevity). He, therefore, set aside the sentence imposed upon them by the Magistrate, and ordered their release, on each of them executing bond of good behaviour for a period of one year, as contemplated under Section 4 of the P.O.Act .

Being aggrieved by the order passed by the Court of Sessions, granting benefit of the provisions of the P.O.Act to the accused persons, the appellant has approached this court by filing the present appeal. The accused persons, being dissatisfied by the order passed by the Sessions court, *in so far as it maintained their conviction, as recorded by the Magistrate*, have approached this court by filing the present revision.

It is under these circumstances, that the appeal and the revision are being disposed of by this common judgment.

3 For the sake of convenience and clarity, the appellant – who is the respondent no.1 in the revision application – shall hereinafter be referred to as 'the complainant.' Respondent nos.2 to 7 who are the applicant nos.1 to 6 respectively, in the revision application, shall hereinafter be referred to as 'the accused.' Whenever separate reference to a particular accused would be necessary, it would be made by mentioning his/her number as the accused in the in the original proceedings before the Magistrate.

4 I have heard Mr.Harish Bhadbhade, the learned counsel for the accused persons. I have heard Mr.G.V.Limaye, the learned counsel for the appellant. I have heard Mrs.M.R.Tidke, the learned APP, for the State. I have taken into consideration the case law relied upon by the learned counsel for the accused persons.

5 The case of the complainant, as made out in the complaint and as put forth before the trial court, may in brief, be stated thus :

a) The complainant, at the material time, was residing at Dapoli with his parents, sister-in-law and niece, in a rented premises in a chawl. Smt.Nalini (accused no.3) was the owner of the said chawl, and thus, the landlady of the complainant. On 20th November 1994, the complainant, probably to level the ground, dug in the courtyard in front of his room. However, the complainant could not complete the work of leveling during the daytime and had to leave it incomplete at the end of the day, as it

became dark. On the next day, at about 9.00 a.m., when the complainant was sitting in front of his room, Nalini and her son Vishnu (accused no.4) came there, abused the complainant and questioned him as to 'why he had dug the 'pit' and 'whether the place was belonging to his father.' The complainant then said that he was going to complete the work and that he should not be abused and that he was going to level the ground. The complainant also said that 'if they had any grievance against him, they should take legal action against him.' On this, Nalini – accused no.3, got angry and further abused the complainant. She said that she would beat the complainant by a *chappal*. The complainant then said that if Nalini was to beat him by *chappal*, he was also having *kolhapuri chappal*. On this, accused no.3 - Nalini rushed towards the complainant and slapped him. When the complainant asked her to go away, the accused no.4 Vishnu and Bapu Shinde (accused no.5) – brother-in-law of accused no.4 Vishnu and son-in-law of Nalini – rushed towards the complainant and started abusing him. They made utterances to the effect that the complainant should be beaten; and therefore,

the complainant, in order to avoid any further untoward incident, came inside his room. However, the accused nos.3, 4 and 5, all came behind him. The accused no.5 held the complainant from behind and the accused no.4 assaulted him with fist blows. The complainant sustained an injury on his left wrist. During the incident, the accused no.3 was instigating the accused nos.4 and 5 to assault the complainant. The mother and sister-in-law of the complainant and also one Mandar Dolas- another tenant – came there and rescued the complainant.

b) The complainant wanted to report the matter to the police, and therefore, left for Dapoli Police Station along with Mandar Dolas (PW4). At that time, accused no.3 Nalini said to accused no.4 Vishnu, that he should telephone to 'A.B.Sawant Uncle' (accused no.6) – who was also a tenant of accused no.3, and was employed in the State Transport – and ask him to go to the Police Station. According to the complainant, the accused no.6 was friendly with Vilas Bhosale – the accused no.1, who was at the material time a Sub-Inspector of Police, attached to Dapoli Police

Station, and that, that is why accused no.3 asked accused no.4 to telephone to accused no.6, and asked him to go to the Police Station.

c) When the complainant reached the Police Station, the accused no.6 was already present there, talking to one Prakash Jadhav. Head Constable Chavan, who was the Station House Officer, did not record the report of the complainant, and sent him to the Government Hospital along with a *police yadi*, for medical check up. The complainant was examined and treated medically, whereafter, he came back to the Police Station and asked the said Head Constable to register his report. The Head Constable took the complainant in front of the room of the accused no.1. The accused no.1, then, abused the complainant in most filthy manner giving abuses in the name of the complainant's mother, sister-in-law, etc. (It is not necessary to reproduce here the filthy abuses, that have been mentioned in the complaint, and also in the evidence of the complainant). The accused no.1 then pulled the complainant inside the room and asked accused no.2 – Garate – a

Police Constable, to bring a flour mill belt. When the accused no.2 brought the same, the accused no.1 assaulted him with it on his right hand. The accused no.2 also beat the complainant on the right hand wrist. In spite of this beating being given to him, the complainant was requesting the accused no.1 to register the report which he wanted to lodge. The accused no.6, who was present there, got annoyed because of this and asked accused no.1 to remove the clothes of the complainant and assault him with the belt. As per the directions of accused no.1, the accused no.2 removed the clothes of the complainant. The complainant was made naked and was forced to lie in prone position. The accused no.2, as per the directions of the accused no.1, assaulted the complainant with the belt on his hips. The accused no.1 himself also assaulted the complainant with the belt. The complainant was, thereafter, put in lock up.

d) On the next day, at about 11.00 a.m., the complainant was produced before the *in-charge* Tahsildar. The complainant made a complaint of beating by the police and requested that he be sent

for medical check up. The *in-charge* Tahsildar said that he being merely 'in charge', he could not send the complainant for medical check up. At about 5.00 p.m., on the same day, after the advocate for the complainant had intervened in the matter, the complainant was produced before the Tahsildar, whereafter, the Tahsildar sent the complainant for medical examination. The complainant was later released on bail.

6 Thus, according to the complainant, due to the quarrel that had taken place between him and the accused no.3, the accused nos.3, 4 and 5 had assaulted him in the morning in his house, causing hurt to him. That, when he wanted to lodge a report against the said accused with the police, the accused no.3 got the accused no.6, who had very close relations with accused no.1, informed about it and the accused no.6 met the accused no.1, who at the instance of the accused no.6, abused and assaulted the complainant brutally with the help of his subordinate – the accused no.2.

7 Thus, the complaint relates to two different incidents. The first one is that took place in the chawl where the complainant and the accused nos.3, 4 and 5 reside, and the second is that took place in the police station.

8 During the trial, the complainant examined totally eight witnesses. The first witness is the complainant himself. One Smt.Shubhada Sawant is the second witness. Dr.Shishir Bhatkar, Medical Officer attached to Rural Hospital, Dapoli, is the third witness. Mandar Dolas, who had dropped the complainant to the Police Station on his motorcycle is the fourth witness. Dr.Ajit Belose, who had medically examined the complainant on 22nd November, 1994, is the fifth witness. Shankar Palshetkar, the Tahsildar, to whom the complainant had made a complaint about beating of the police, is the sixth witness. Prakash Jadhav, referred to earlier, is the seventh witness, while Sunil Pawar, Depot Manager, S.T.Depot, Dapoli, is the 8th witness. The accused nos.1 and 2 examined three witnesses in their defence. In addition to the oral evidence of these witnesses, a number of documents were tendered in evidence, marked and exhibited.

9 Though the appeal and revision are being disposed of by this common judgment, obviously, it would be necessary to first examine, whether the conviction of the accused persons, as recorded by the Magistrate and as maintained by the Additional Sessions Judge, is proper and legal, or whether the same suffers from any error, impropriety or illegality warranting interference in exercise of the revisional jurisdiction of this court. It is only if the conviction of the accused is found to be proper and legal, needing no interference from this court, that the question raised in the appeal viz., whether it was proper to grant the benefit of the provisions of the P.O.Act to the accused would arise.

10 Mr.Bhadbhade, the learned counsel for the accused persons, contended that the appreciation of the evidence, as done by the trial court, is erroneous. According to him, there were a number of discrepancies in the evidence of the complainant, and that, therefore, the accused persons should have been given benefit of doubt and acquitted. He contended that the

complainant had made certain statements during his evidence in a civil suit filed by him, which were contrary to the evidence given by him before the learned Magistrate. Among other things, it was submitted that the complainant had even gone to the extent of 'changing the spot of the alleged incident.' It was submitted that as per the complaint, the second incident of assault had taken place in the Police station, but in the evidence, the complainant said that it had taken place in the house of the accused no.1. Apart from these contentions, relating to appreciation of evidence, it is also submitted that so far as the accused nos.1 and 2 are concerned, the cognizance of the alleged offences could not have been taken in view of the provisions of Section 197 of the Code of Criminal Procedure (Code).

11 Mr.Limaye, the learned counsel for the complainant, on the other hand submitted that the judgment delivered by the Magistrate and the conclusions arrived at by him, are proper and legal. He submitted that there is a concurrent finding of fact by the Magistrate and by the Additional Sessions Judge in appeal,

and that such concurrent finding of fact is not liable to be disturbed in the revisional proceedings. He also submitted that since the accused have been found guilty, this was not a case – atleast with respect to the accused nos.1 and 2 – to grant the benefit of the provisions of P.O.Act to them. He submitted that the accused nos.1 and 2 had humiliated the complainant, assaulted him brutally, and that, such offences by police officers should not be dealt with leniently by extending the benefit of the provisions of the P.O.Act to them.

12 I have carefully considered the matter. I have gone through the record. I have carefully gone through the judgment delivered by the learned Magistrate, as also the judgment delivered by the learned Additional Sessions Judge in the appeal.

13 Revisional jurisdiction – by exercising which, the accused expect this court to interfere with the judgment of conviction delivered by the trial court and maintained by the

appellate court – is different from the appellate jurisdiction. *It is meant to be exercised for correcting a manifest error of law resulting in miscarriage of justice.* Revisional jurisdiction is ordinarily not invoked merely because the lower court has misappreciated the evidence on record. It is well settled that appreciation of evidence is not within the jurisdiction of revisional court. (See – a) **Dr.Stephen vs. Nasibulla**¹ b) **Logendranath Jha**² and c) **Akalu Ahir vs. Ramdev Rane**³).

14 It may, however, be necessary to examine the evidence to see whether the findings that have been arrived at, are based on no evidence or whether they are based on irrelevant or inadmissible evidence, or whether they have been arrived at, by ignoring relevant and admissible evidence, or whether the conclusions arrived at do not logically follow from the facts held as proved. I have, therefore, fully gone through the evidence and considered the contentions raised by Mr.Bhadbhade in the light of the evidence.

1 AIR 1951 SC 196, 52 Cri.L.J. 196

2 AIR 1951 SC 316, 52 Cri.L.J. 1248

3 AIR 1973 SC 2145, 1973 Cri.L.J.1404

15 The main emphasis of Mr.Bhadbhade is on alleged 'change of place of incident' by the complainant, which according to him, is a factor sufficient to throw out the complainant's case. According to Mr.Bhadbhade, the complaint alleges that the accused nos.1 and 2 assaulted the complainant in the Police station, but in the substantive evidence, the complainant had '*changed his entire case*' and came out with a case that the accused nos.1 and 2 had assaulted him at the residence of the accused no.1. It was submitted that in the Charge that was framed against the accused persons, it was mentioned that the assault on the complainant had taken place in the Police station and according to Mr.Bhadbhade, what has been held by the court is that the assault was at the residence of the accused no.1. The contention is that, '*therefore, what was alleged had not been proved*', and that, '*therefore, the accused nos.1 and 2 should have been acquitted.*'

16 There is no substance in this contention. As a matter of fact, this contention, viz., 'that the complainant had changed the place of assault', was raised before the trial court, as well as

the appellate court, but none of the courts was impressed by this contention. In this regard, the learned Magistrate observed that the complainant was subjected to a very lengthy cross-examination, which was stretched over for a period of more than two years. The Magistrate observed that the residence of the accused, i.e. the quarter allotted to him, was situate in the premises of the Police station itself, and that, therefore, there was no change of 'spot' or 'place of incident' by the complainant. The learned Additional Sessions Judge, who heard the appeal, was also not impressed by the theory of the complainant having 'changed the spot of incident', as a ground to discard or disbelieve the alleged incident of assault, as spoken about by the complainant. The learned Additional Sessions Judge was of the view that, the incident took place in the year 1994, and that, the complainant's evidence was recorded after about a gap of six to seven years, and that, not much importance, therefore, to the discrepancy with regard to the place where the assault actually took place, viz., whether at the Police station, or at the residence of the accused – *located in the Police station* – should be given.

17 In my opinion, the reasoning of both the courts below, which have not given much importance to this aspect, is proper. In the complaint, the place of the incident has been mentioned as the 'room of the accused' and not specifically as the 'Police station.' The relevant part of the complaint reads as follows :

“अौषधोपचार करुन फिर्यादी परत पोलीस स्टेशनला तक्रार देणेंस आला असता त्याला हेड कॉन्स्टेबल श्री.चव्हाण यांनी आरोपी नं.१ च्या खोलीसमोर नेले.”

Translated in English, it would read thus :

“When the complainant after taking medical treatment returned to the Police Station for lodging a report, Head Constable Chavan took him in front of the *room* of accused no.1.”

Thus, it is not clear that the *room* spoken about in the complaint, is the cabin of the accused no.1 in the Police station, or whether it was his residential room, particularly because, it is not in dispute that the accused no.1 had his residence in the campus of the Police station itself, and that, there was hardly a distance of about 50 feet between the entrance of the Police station and the

residence of the accused no.1. However, even assuming that the place of incident was deliberately changed by the complainant subsequently, to take the matter outside the purview of the protection afforded to the accused nos.1 and 2 by Section 197 of the Code, (as suggested by Mr.Bhadbhade, on specifically questioning) the same would not show that the allegation leveled by the complainant against the accused nos.1 and 2 is false. It could be, that the complainant might be under a mistaken belief that, if he would state that the assault had taken place in the Police Station, there might arise the question of necessity of obtaining sanction under Section 197 of the Code to prosecute the accused nos.1 and 2, and that, instead if he would say that the assault took place in the house of the accused, there would be no such necessity. It is possible that because of such misconception about the legal position, the complainant is changing the spot of the incident, where the assault allegedly took place. However, in my opinion, all that this would indicate is that, the complainant is not a *wholly reliable witness*. That, however, does not mean that he is a *wholly unreliable witness* and that whatever he states is

liable to be disbelieved and discarded. The complainant is obviously interested in the outcome of the case and might have been advised – or otherwise been shrewd enough – to change the place of incidence to avoid a possible argument about the applicability of the provisions of Section 197 of the Code. However, even if this possibility viz., the complainant having shrewdly changed the place of incident is accepted, and consequently, that he is not a wholly reliable witness is also accepted, it would not automatically lead to the conclusion that the incident of assault, as spoken about by him, is false or unbelievable. The courts are usually reluctant to act on the maxim *falsus in uno falsus in omnibus*. Once a witness is found to be not wholly reliable, all that is required to be done is to examine his evidence cautiously and see whether it gets any corroboration from the other evidence, whether it fits in properly with other circumstances which are either undisputed or satisfactorily proved, and whether it is in consonance with the normal probabilities.

18 In this case, undoubtedly, there are marks of injuries on the person of the complainant. There is no serious challenge – rather no challenge – to this aspect of the matter. Unfortunately for the accused nos.1 and 2, the complainant was got medically examined twice – first by Dr.Shishir Bhatkar (PW3) on 21st November 1994, at about 10.15 p.m., and later, on 22nd November 1994, by Dr.Ajit Belose. Dr.Bhatkar had noted three injuries on the person of the complainant i.e. one on left palm and two on left forearm. Dr.Belose found injuries on other parts of the body of the complainant i.e. at left hip joint, on left buttocks, on right hip joint etc. Obviously, the injuries that were noticed by Dr.Belose, were caused subsequently, i.e., after the complainant was medically examined by Dr.Bhatkar. The possibility of complainant actually having these injuries on his body at that time, but deliberately not showing to Dr.Bhatkar (PW3) (the purpose of which could only be to make the acts of accused nos.3, 4 and 5 less serious), is too absurd and is not even worth mentioning, except for a feeble suggestion to that effect, which was given by Mr.Bhadbhade.

The presence of injuries on the complainant's person, which injuries were, undoubtedly, caused *after* the complainant had been examined by Dr.Bhatkar, that is, after 10.15 a.m. on 21st November 1994, supports the allegation of the complainant against the accused no.1 and the accused no.2. The evidence shows that after getting himself examined by Dr.Bhatkar, the complainant had straight come to the Police station and it is nobody's case that he was, on the way, beaten by someone. Thus, when the story of assault was corroborated by medical evidence, it would be futile to contend that the evidence of assault by accused nos.1 and 2 should not be believed because the complainant earlier stated that it took place at the police station, and later, stated that it took place in the house of the accused no.1, situate in the Police station campus. Such a way of reasoning would be absolutely illogical and irrational.

19 The other contentions raised by Mr.Bhadbhade in support of his claim that the judgment delivered by the trial court is erroneous may now be examined. Mr.Bhadbhade submitted that

while arriving at the conclusion about the presence of the accused nos.3, 4 and 5 on the scene of offence, when the first incident took place, the trial court has relied upon the 'evidence and the complaint in another case', and that, the same was impermissible and perverse. He has drawn my attention to paragraphs 14 and 15 of the judgment delivered by the trial court. I find that this criticism of the reasoning of the learned Magistrate and the conclusions arrived at by him, totally unjustified. The Magistrate has concluded about the presence of the said accused on the scene of the offence on the basis of evidence adduced in the present case – (and more particularly that of the complainant) only; and reference to the other case, which is arising out of a complaint lodged by the accused no.4 herein, has been made only to lend assurance to the evidence of the complainant. The version of the accused no.4, as reflected in the said other case, has been taken into consideration only for the purpose of holding that *even as per the version of the accused no.4, the presence of the accused nos.3 and 4 on the scene of the offence, was never a matter of dispute.* There is no perversity in the reasoning of the learned Magistrate.

Mr.Bhadbhade also contended that the dispute arose suddenly, and that, therefore, the Magistrate could not have come to a conclusion that the hurt that was caused to the complainant in the first incident, had been caused in furtherance of the common intention of the accused nos.3, 4 and 5. It is not possible to agree with Mr.Bhadbhade, as it is well settled that common intention can be formed and developed suddenly and on the spot. It is not that a conclusion about a particular act having been done in furtherance of the common intention of all the accused can be arrived at, only when the act is preplanned. Common intention is largely a matter of inference to be drawn from the facts and circumstances of a particular case, and in this case, there was sufficient evidence to conclude about the hurt having been caused in furtherance of the common intention of accused nos.3, 4 and 5. There is, therefore, no substance in this contention also.

20 Mr.Bhadbhade also drew my attention to the document at Exhibit 258, which is a copy of the roznama in respect of the 'chapter proceedings' said to have been initiated

against the complainant. The roznama shows that when the complainant was produced before the Magistrate on 22nd November 1994, he did make a statement that he was assaulted (मारहाण झालेली आहे) but he did not specifically state that the assault was by the police. The absence of this specific mention in the roznama is sought to be highlighted by Mr.Bhadbhade to claim that, at that stage, the complainant did not level any allegation *against the police*. It is not possible to agree with this contention. Infact, the evidence shows that the complainant was produced in a handcuffed position before the Executive Magistrate, and that, at that time also, the complainant spoke of assault. No attempt was made by the accused persons to explore this point further during the trial and the matter was left at that. When such is the position, not only the contention advanced by Mr.Bhadbhade does not assist the accused nos.1 and 2 in any manner, but on the contrary, shows that the complainant **did** complain about assault, which, in the context of the other facts stated by him, must be taken as complaint about assault *by the police*.

21 Mr.Bhadbhade, then raised certain contentions saying that the injuries on the body of the complainant did not match with the description of the weapon of assault, as given by the complainant, while narrating the history of the assault, as has been reflected in the medical certificate. I have examined this and find no substance in this contention. There is nothing to show that the injuries that were noticed on the body of the complainant, *could not have been caused*, in the manner in which the complainant said they were caused. Some contentions have been raised about there being a variance in the injuries reflected in the medical certificate issued by Dr.Bhatkar and the medical certificate issued by Dr.Belose. There is no substance in this contention also. The certificate issued by Mr.Belose mentions more injuries, than the injuries mentioned in the certificate issued by Mr.Bhatkar, and this is quite natural. If the injuries caused earlier have been described in a different manner by Dr.Belose, than described by Dr.Bhatkar, that is quite possible because, Dr.Belose was focusing on certain other injuries, which were caused on the buttocks and hips of the complainant, and had, no specific reason to concentrate

only on the injuries on the forearm, which were the only injuries on the person of the complainant, when he was examined by Dr.Bhatkar. Moreover, there had been a time gap between these two medical examinations, making a change in the appearance of the injuries possible.

22 After going through the evidence and the judgment delivered by the trial court, I do not find any error and infirmity in the conclusions that have been arrived at, by the trial court. I have also gone through the judgment delivered by the appellate court and I find that the re-appreciation of the evidence, as done by the appellate court, concurring with the conclusion arrived at by the trial court, also suffers from no infirmity. Both the courts have considered the defence evidence adduced by the accused no.1, before arriving at a conclusion. The defence version has been rightly rejected by both the courts.

23 As aforesaid, the examination of the evidence in the revisional jurisdiction can be only for a limited purpose – for finding out as to whether the findings arrived at are based on

relevant and admissible evidence, or whether they have been arrived at without any evidence, or are based on irrelevant or inadmissible evidence, or whether the conclusions arrived at, do not logically follow at all from the facts held as proved, or some other ground/s of a like nature. In this case, the appreciation of evidence, as done by the trial court and that by the appellate court, is not suffering from any such illegality or impropriety, as would warrant interference with the findings arrived at, by exercising the revisional jurisdiction. On the contrary, after having gone through the entire evidence, even this court comes to the same conclusions, that have been arrived at by the trial court and the appellate court.

24 Apart from the contentions which were basically based on the appreciation of the evidence, Mr.Bhadbhade has also raised a contention based on the legal position. He submitted that in this case the cognizance of the alleged offences, so far as the accused nos.1 and 2 are concerned, could not have been taken at all, in view of the provisions of Section 197 of the Code. I find that such

a contention was taken before the appellate court also and in the appellate court a claim that the protection afforded by Section 197 was available to the accused no.6 also, was made. The appellate court, after considering the case law relied upon by the parties, came to the conclusion that no such sanction was necessary for prosecuting the accused nos.1, 2 and 6. It may be observed here that the protection afforded by Section 197 of the Code is not available to all the public servants. It is applicable only to a particular category of public servants i.e. 'those who are not removable from their office, save by or with the sanction of the government.' There is absolutely nothing to show that the accused no.6 fell in the category of public servants, to which protection has been afforded by Section 197. Therefore, the question of necessity of sanction with respect to the accused no.6 must be rejected forthwith without any further examination. So far as the accused nos.1 and 2 are concerned, however, by virtue of a notification issued under sub-section (3) of Section 197 of the Code, the accused nos.1 and 2 fall in the category of public servants, to whom the protection of Section 197

would be available. Therefore, the question that arises is, whether the alleged offences had been committed by the accused nos.1 and 2 '*while acting or purporting to act in discharge of their official duty.*'

25 Mr.Bhadbhade contended that Chapter proceedings were initiated against the complainant, and that, the complainant was arrested in accordance with the provisions of Section 41(2) of the Code. Infact, this appears to be the case of accused no.1, as put forth by him during his examination under Section 313 of the Code. According to this version of accused no.1, on the basis of a report regarding a non-cognizance offence, made by accused no.3 Nalini, the complainant was arrested under the provisions of Section 41(2), and then, the complainant was produced before the Executive Magistrate in connection with the chapter case registered as No.52 of 1994. It appears that, the complainant was said to be a person to whom the provisions of Clause (e) and Clause (g) of Section 110 of the Code was applicable, and this is given as a justification for the apprehension of the complainant.

Now, whether, because the arrest of the complainant was shown to have been made in a chapter case, the assault by accused nos.1 and 2 on him, would get covered by the expression “*while acting or purporting to act in discharge of their official duty*” is the question.

26 The question of availability of the protection provided by Section 197 of the Code often comes up before the Criminal courts and there have been a number of authoritative pronouncements of the High courts and also of the Apex court, dealing with the scope of the expression '*while acting or purporting to act in discharge of their official duty*', which are the crucial words for deciding the necessity of sanction under the said section. A perusal of the reported decisions on this aspect shows that the decisions in the interpretation of the said section are not uniform. Among the old cases, the case of **Hari Ram Singh**⁴ is most referred to in the later judgments. Though in that case, Their Lordships were dealing with the provisions of Section 197 in the old Code, since those provisions were similar to

4 40 Cr.L.J. 468

the provisions in the present Code, the legal position remains unchanged so far as the present state of law is concerned. It was observed in the judgment delivered by His Lordship Mr. Justice Varadachariar of the Federal Court as under :

“It does not seem to me necessary to review in detail the decisions given under Section 197 of the Criminal Procedure Code, which may roughly be classified as - falling into three groups, so far as they attempted to state something in the nature of a test. In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it – **Cf. Abdul Kadir, In re 17 Cr LJ 168; Raja Rao ILR 50 Mad 754; Amanat Ali Air 1939 Cal 724; - Gurushidayya 40 Cr LJ 269.** In another group, more stress has been laid on the circumstance that the – official character or status of the accused gave him the opportunity to commit the offence. It seems to me that the first is the correct view. In the third group of cases, stress is laid almost exclusively on the act that is as at a time when the accused was engaged in his official duty that the alleged offence was said

to have been committed – **Gangaraju ILR 52 Mad 602, 605** – quoting from B.B.Mitra on Code of Criminal Procedure. The use of expression – ‘while acting’, etc. in Section 197 of the Criminal Procedure Code (particularly its introduction by way of amendment in 1923) has been held to lend support to this view. While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test. To take an illustration suggested in the course of the argument, if a medical officer while on duty in the hospital is alleged to have committed rape on one of the patients or to have stolen a jewel from the patient’s person, it is difficult to believe that it was the intention of the legislature that he could not be prosecuted for such offences except with the previous sanction of the Local Government.”
(quoted from B.B.Mitra on Code of Criminal Procedure, 20th Edition, 2003, Page 820.)

The object of Section 197 of the Code is to protect certain categories of public servants from the fear of being prosecuted on frivolous and false charges and to enable them to discharge their duties in a fearless manner. At the same time, granting protection

to a class of persons is basically inconsistent with concept of the rule of law and equality before law. The too wide construction of the relevant provisions would not be in accordance with the rule of law where the basic idea is of legal equality or of universal subjection of all citizens to one law. The reported decisions of the High Courts and the Apex Court show that the question of sanction is always examined by attempting to strike a balance between these somewhat conflicting considerations, and therefore, the question of sanction is always examined in the light of the facts of a particular case.

27 In Bhagwan Prasad vs. N.P.Mishra⁵ the Supreme court of India has observed as follows :

“...The principle embodied in this section (Section 197) seems to be well understood; the difficulty normally lies in its application to the facts of a given case. The question whether a particular act is done by a public servant in the discharge of his official duty is substantially one of the fact to be determined on the circumstances of each case.”

(emphasis supplied)

5 AIR 1970 SC 1661

In State vs. Shiv Lal⁶ the Delhi High court, after analysing a number of decisions, concluded as follows :

“On analysis of various judgments decided by Their Lordships of the Supreme court, the conclusion becomes irresistible that the public servant is entitled for the protection of his acts done in the course of official duty or under colour of offence would depend on the facts of each case.”

(Paragraph 18) (Emphasis supplied)

For deciding whether the alleged offences had been committed by a public servant '*while acting or purporting to act in discharge of his official duty*' in a given case, the courts have propounded various tests. It would be useful to refer to two more authoritative pronouncements of the Supreme Court of India to examine the nature of tests that have been applied in deciding the aspect of necessity of sanction.

6 1998 Cri.L.J. 3910

In **Matajog Dobey vs. H.C.Bhari**⁷ a Constitution Bench of five Hon'ble Judges of the Supreme Court of India had occasion to deal with the relevant provisions. Their Lordships discussed and noticed some of the previous judgments on the relevant aspect and also referred to **Amrik Singh Vs. The State of PEPSU**⁸. Their Lordships were pleased to quote what was summarized in the said case of **Amrik Singh** as follows :

“If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under section 197 (1) would be necessary, but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required.” (emphasis supplied)

28 After a thorough discussion of the case law on the relevant aspect, Their Lordships in the aforesaid case of **Matajog Dobey vs H.C.Bhari, (Supra)**, ultimately concluded as follows :

⁷ AIR 1956 SC 44

⁸ AIR 1955 SC 039

“The result of the foregoing discussion is this :
There must be a reasonable connection between
the act and the discharge of official duty; the
act must bear such relation to the duty that the
accused could lay a reasonable, but not a
pretended or fanciful claim, that he did it in the
course of the performance of his duty.” (Para-20)
(emphasis supplied)

In this case, the contention is that the complainant was arrested in accordance with the provisions of Section 41(2) of the Code. The relevant section, as was in force before its substitution by Act 5 of 2009, permitted a Police Officer to arrest or cause to be arrested any person belonging to one or more of the categories of person specified in Section 109 or Section 110 of the Code. Section 109 refers to a person in respect of whom information is received by an Executive Magistrate that such a person is taking precaution to conceal his presence and that there is a reason to believe that he is doing so with a view to committing a cognizable offence. Section 110 applies to a person who is a habitual offender. Clause (g) of the said section, on the basis of which the accused no.1, during his

examination under Section 313 of the Code, tried to justify the arrest, refers to persons, who are “so desperate and dangerous as to render their being at large without security hazardous to the community.” It is impossible to accept, even on a *prima facie* look at the matter, that the complainant could be fitted into any of the said categories. The evidence clearly indicates that the complainant was apprehended only at the instance of the accused no.6, who was acting at the instance of the accused nos.3 and 4, and with the object of 'teaching a lesson to him.' The claim that the complainant was arrested in accordance with the provisions of Section 41(2) of the Code was made just to show that some official act or duty was being performed. The way the things have happened, it is clear that there had been no time for the police to register a report in respect of non-cognizable offences, if any, filed by the accused no.3 and to take a decision of putting forward a proposal to the Executive Magistrate for initiating 'chapter proceedings.' There is nothing to show that any such proposal was ready or put forth before the Magistrate at the material time. It is obvious and clear that the arrest and detention of the

complainant was not at all justified in law, and that, the alleged offences have been committed by the accused nos.1 and 2 '*while acting or purporting to act in discharge of their official duty*' is only a 'pretended or fanciful claim.' [borrowing the phrase used by Their Lordships in the case of **Matajog Dobey vs H.C.Bhari (Supra)**]. Even otherwise, the act of filthily abusing and assaulting a person arrested and detained in custody by removing his clothes, can by no stretch of imagination be said to be one to which the protection under Section 197 of the Code would be available. The facts of the case as disclosed from the evidence and as held to be proved by both the courts below, leave no manner of doubt that the act of abusing and assaulting the complainant by making him naked, was a thoroughly unlawful and malafide act which cannot be brought within the protective umbrella of Section 197, *irrespective of whether the arrest and detention of the complainant was lawful or not.* At the instance of the other accused, and more particularly, at the instigation of the accused no.6, the complainant was to be 'taught a lesson' and the accused no.1 used his official position as a cloak or guise to inflict harm

upon the complainant at the instance of accused nos.3 and 6. This had nothing to do with the official duty of the accused nos.1 and 2. It is impossible to accept that the protection available under Section 197 of the Code could be extended to the accused nos.1 and 2 in this case where their official status had only provided the occasion and was used as an opportunity to commit the offences in question. There was, therefore, no illegality in taking cognizance of the offences allegedly committed by them.

29 No error of law – much less a patent or manifest error of law – has been committed either by the trial court or by the appellate court. The finding that the accused have committed the offences in question, as arrived at by the trial court, as also by the appellate court, suffers from no error, illegality or impropriety.

30 It, therefore, follows that, the revision application has no merit and deserves to be dismissed.

31 The question that now needs determination is, whether the appellate judgment delivered by the Additional Sessions Judge maintaining the conviction, but granting the benefit of the provisions of the P.O.Act to the accused persons, is proper and legal, or whether the same needs to be set aside, and whether the sentence imposed upon the accused persons by the Magistrate should be restored, or any other sentence should be imposed upon them.

32 The appeal has been filed by the complainant, who is – so to say – successful in the proceedings. His case, that he was assaulted by the accused persons, has been accepted, and the accused have been held guilty. The question is, whether inspite of this, the complainant can file an appeal against the appellate order passed by the Additional Sessions Judge.

33 Though no objection to the maintainability of the appeal has been raised on behalf of the accused persons, still, it would be desirable to examine the legal position in that regard.

The appeal has been filed by virtue of provisions of Section 11(2) of the P.O.Act which reads as follows :

“Section 11(2):

Notwithstanding anything contained in the Code, where an order under section 3 or section 4 is made by any court trying the offender (other than a High Court), an appeal shall lie to the court to which appeals ordinarily lie from the sentences of the former court.”

The question, whether a complainant can prefer an appeal under sub-section (2) of Section 11, was dealt with, by different High Courts in a number of cases, and there was a divergence in view, as regards the maintainability of such an appeal by the complainant. The divergence has been set at rest by the decision of the Supreme Court of India in **Prithvi Raj and Ors. vs. Kamlesh Kumar and Anr.**⁹ wherein Their Lordships had an occasion to examine the said question. Their Lordships observed that the *language of Section 11(2) is unrestricted as to the person who can prefer an appeal.* Their Lordships also observed that

⁹ 2005 S.C.C. (Cr.) 347

though under the Code the appeal proceedings were concerned only with the orders of acquittal or conviction, the provisions in Section 11(2) of the P.O.Act deal with something distinct from the fact of conviction or acquittal. Their Lordships observed :

“The appeal under Section 11(2) of the Act is not against acquittal or conviction but the propriety of the order passed under Section 3 or Section 4 of the Act. The intention of the legislature apparently is to confer such a right both on the prosecution and the accused.”

Their Lordships held that the view expressed by some High courts in favour of the maintainability of such an appeal was the correct view, and that, the contrary view was not correct. Thus, clearly, the appeal filed by the complainant is maintainable.

34 The scope and limit of interference in such an appeal was also considered by Their Lordships of the Supreme Court of India in the aforesaid case of **Prithvi Raj (supra)**. Their Lordships observed that Section 11(4) of P.O.Act makes the position clear

that only the propriety of the order passed under Section 3 or Section 4 in respect of the offenders can be dealt with by the appellate court. So far as the present appeal is concerned, indeed, only the question of the propriety of the order passed under Section 4 of the P.O.Act has been raised.

35 Before discussing this aspect of the matter, certain developments that have taken place after the appeal was filed, need a mention. It is stated before me that the accused no.2 – Baban Garate, accused no.3 – Nalini Mhamankar, and accused no.4 – Vishwas Mhamankar, have passed away during the pendency of the present appeal. In these circumstances, it appears pointless to me to consider the question of interfering with the order treating them in accordance with the provisions of Section 4 of the P.O.Act.

36 In my opinion, the propriety of the order passed under Section 4 of the P.O.Act, must be considered in relation to a particular accused, and no general conclusion in that regard can

be arrived at. Looked at from this angle, the accused persons could be broadly classified in two categories, i.e., the accused nos.1 and 2 in one category and the rest of the accused in the other. The treatment that needed to be given to these two categories of accused could be justifiably different.

37 So far as the accused nos.3,4, 5 and 6 are concerned, I do not think that the order granting benefit of the provisions of the P.O.Act to them, should be interfered with. As aforesaid, the accused nos.3 and 4 are no more, and there would be no point in considering the propriety of the said order, so far as they are concerned. Even as regards the accused nos.5 and 6, I do not find anything patently improper in extending the benefit of the provisions of the P.O.Act, as has been done by the appellate court. In any case, the changed circumstances and the situation as exists today, must be taken into consideration, before it is decided to interfere with the order passed by the appellate court in reference to these accused. Accused no.5 - Bapu Shinde, is the son-in-law of accused no.3. He was involved in the controversy and the

incident because of his relationship with the accused nos.3 and 4. The offences that were committed by the accused nos.3, 4 and 5 cannot be said to be of a very serious nature going by the punishment provided therefor. None of these accused, had any previous criminal record – atleast no such submission has been made before this court. The acts attributed to the accused nos.5 and 6 are not of the same seriousness and gravity, compared to that attributed to the accused nos.1 and 2. They, therefore, need not be made to undergo any substantive sentence or even a sentence of fine, by interfering with the order passed by the appellate court, when the order does not seem to be suffering from any illegality or error. The discretion available to the Additional Sessions Judge in that regard cannot be said to have been exercised arbitrarily or contrary to the well established principles, so far as dealing with the accused nos.5 and 6 under the provisions of P.O.Act is concerned. Undoubtedly, the case of the accused no.6 is somewhat different from that of the accused no.5, but after taking into consideration the fact of death of accused nos.3 and 4, that the accused no.6 was acting at the

instance of accused no.3, and that, the incident had taken place about 21 years back, I am not inclined to interfere with the order of the Additional Sessions Judge, so far as it relates to him.

38 This brings us to the question, as to, whether the order releasing the accused nos.1 and 2 on a bond of good behaviour, as contemplated under Section 4 of the P.O.Act, is proper or legal. There exists a distinction in case of the accused nos.1 and 2 also, in as much as, the accused no.2 Garate was, admittedly, subordinate to accused no.1 and had acted as per the directions of the accused no.1. Since accused no.2 is now dead, keeping all the other relevant aspects of the matter in mind, I do not see any point in examining the question of the propriety and legality of the said order, so far as it relates to him. I, therefore, decline to go into that aspect and do not think it proper to interfere with the order passed by the learned Additional Sessions Judge, so far as it relates to the accused no.2 Garate.

39 This brings us to the last and final question needing determination, viz., i.e., whether the order passed by the Additional Sessions Judge, in so far as it directed release of the accused no.1 on executing a bond of good behaviour, as contemplated under Section 4 of the P.O.Act, is proper and legal, or whether it needs to be interfered with.

40 The trial court had viewed the acts committed by the accused no.1 (and also the accused no.2) seriously. The accused no.1 was a responsible officer of police. He appears to have misused his position of authority, to help the accused no.3, who had approached the accused no.1, through the accused no.6, for settling her own scores against the complainant. He is proved to have abused the complainant in most filthy manner and had beaten him with the object of terrorizing him. The accused no.1 just pretended to be acting in his official capacity by making an illegal – or at any rate – an unjustified arrest. The atrocities of such type committed by the police on the citizens need to be

viewed seriously. Ordinarily, those who are wronged at the hands of the police, do not follow up the matter for want of sufficient means or resources, and this factor usually emboldens the police. The acts of the accused no.1, as have been held to be proved by both the courts below, show his arrogance and impudence – obviously generating from the powers vested in a Police Officer by law, and a belief that whatever he did could pass off as a part of his duty, and that, he would not be held accountable or answerable for the wrongs done by him. Granting benefit of the provisions of the P.O.Act to him, was clearly not proper.

41 However, there are some peculiar aspects of the matter due to which I am not inclined to restore the sentences imposed upon the accused no.1 by the Magistrate. As aforesaid, three of the accused have died during the pendency of the present proceedings. The incident has taken place 20 years back. The accused no.1 was held guilty by the trial court and also by the appellate court. The trial took more than 10 years to conclude. The appeal had remained pending over a period of about 5 years.

Throughout this period – and more particularly after his conviction and during the pendency of the appeal – the accused no.1 must have undergone considerable mental stress. The hurt caused to the complainant fell in the category of 'Simple hurt.' The offences, in respect of which the accused no.1 has been convicted (offences punishable under Sections 323 of the IPC and 504 of the IPC), cannot be termed as of a serious nature, going by the punishment prescribed therefor. Seriousness attaches to the offences only because the accused no.1 is a Police Officer, who abused his position to commit the offences and attempted to pass it off as a part of his duty. The cumulative effect of all these aspects, makes me think that, restoring the sentences imposed by the Magistrate upon the accused no.1, in the present circumstances, would be rather harsh.

42 Considering all these aspects, I have thought it desirable to hear the learned counsel for the parties on this limited aspect, viz., as to '*what sentence should be awarded to the accused no.1.*' Accordingly, at this stage, I have heard Mr.Bhadbhade, the

learned counsel for the accused no.1, and Mr.Limaye, the learned counsel for the complainant.

43 Mr.Bhadbhade submitted that the benefit of the provisions of P.O.Act, as has been given to the accused no.1, may not be disturbed and only an order awarding compensation to be paid to the complainant be passed. According to him, if compensation is awarded, the order releasing the accused no.1 on probation, need not be interfered with. Mr.Limaye, the learned counsel for the complainant, submitted that, this is a case of police atrocity, and considering the rising number of such atrocities and the social effect of such atrocities, there would be no question of granting the benefit of the provisions of P.O.Act to the accused no.1.

44 After carefully considering the matter from all angles, and after ascertaining the views of the complainant, who is present in the court through Mr.Limaye, I am not inclined to permit the accused no.1 to avail of the benefit of the provisions of the P.O.Act, even on the basis that an order awarding

compensation to be paid to the complainant can be passed, in terms of Section 5 of the P.O.Act. When this was expressed, Mr.Bhadbhade submitted that, since, now that he has been held guilty, the accused no.1 is ready to pay such compensation, as may be thought fit by the court to the complainant, and that, such compensation would be deposited by him in the court forthwith, if so directed by this court. In view of this, a query was made by me, as to, whether the accused no.1 would be ready to offer compensation in the sum of Rs.50,000/- to the complainant. This query was answered by Mr.Bhadbhade in the affirmative. Mr.Bhadbhade submitted that in view of this assurance given by the accused no.1, only a nominal sentence be imposed upon him.

45 After carefully considering the matter, I am of the opinion that, though it would not be expedient to permit the accused no.1 to avail of the benefit of the provisions of the P.O.Act, still, in the light of the offer given by the accused no.1, and the undertaking given by him to deposit an amount of Rs.50,000/- in the court immediately, it would not be proper to take an undue

harsh view of the matter. It cannot be ignored, as pointed out by Mr.Bhadbhade, that, once the benefit of the provisions of the P.O.Act is not given to the accused no.1, he would face the consequences of the conviction, and is likely to lose the service benefits, such as, pension, gratuity, etc. Nevertheless, a sentence of fine alone, would not be sufficient, and a sentence of imprisonment would be necessary. The complainant had suffered humiliation on account of the acts of the accused no.1. The manner in which the complainant was abused and assaulted, undoubtedly gave a serious blow to his dignity. There has been a serious violation of his human rights, at the hands of the accused no.1. The angle of retribution cannot be entirely overlooked while awarding sentence. Unless, atleast a small sentence of imprisonment is awarded, it will not have the desired deterrent effect on the Police Officers committing atrocities on citizens who come in their clutches. Imposition of a sentence of imprisonment would be necessary also for the purpose of impressing upon all concerned that 'the majesty of law ultimately prevails,' and that, 'an offender is ultimately made to face the consequences of the

wrongs committed by him – his position as a Police Officer not coming to his rescue, in that regard.'

46 All said and done, it needs to be made clear that the conflicting considerations have ultimately resulted in a lenient view of the matter, as regards the sentence, being taken, *mainly because of the consideration that the complainant would be compensated suitably, as offered by the accused no.1*. Therefore, the accused no.1 shall be bound by the undertaking given to this court, through his counsel, to deposit a sum of Rs.50,000/- in the trial court, within a week from today, which amount shall be paid as compensation to the complainant.

47 Considering all the relevant aspects of the matter, in my opinion, a sentence of Rigorous Imprisonment for a period of 3 days together with fine will meet the ends of justice.

48 In the result, the revision application and the appeal are disposed of as follows :

- i) The Revision Application is dismissed.
- ii) The Appeal is partly allowed.
- iii) The order passed by the learned Additional Sessions Judge releasing the accused persons on a bond of good behaviour, as contemplated under Section 4 of the Probation of Offenders Act, so far as it relates to the accused no.1 – Vilas Bhosale – is set aside.

The accused no.1 is sentenced to suffer Rigorous Imprisonment for 3 days and to pay a fine of Rs.1,000/-, in default, to suffer Simple Imprisonment for 2 days, for each of the offences, of which he has been held guilty.

- iv) The order passed by the learned Additional Sessions Judge, so far as it relates to the other accused, is not interfered with.

45 At this stage, Mr.Bhadbhade makes a prayer that the substantive sentences imposed upon the accused no.1 be suspended for some period.

Prayer rejected.

(A.M. THIPSAY, J.)