

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

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**Criminal Revision No. 1130 of 2011 (O&M)
Date of Decision : 22.10.2019**

Dr. Dilbag Singh

... Petitioner

Versus

State of Haryana and others

...Respondents

CORAM:HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present: Mr.Sunil Chadha, Senior Advocate with
Mr. Namish Sodhi, Advocate for the petitioner.

Mr. Arjun Singh Yadav, AAG, Haryana.

Mr. Chanderhas Yadav, Advocate for respondents No.2 and 3.

HARNARESH SINGH GILL, J.

The present revision petition has arisen out of the judgment dated 03.03.2011 passed by the Additional Sessions Judge, Bhiwani, vide which the appeal filed by the petitioner, challenging the judgment of conviction dated 22.05.2008 and order of sentence dated 23.05.2008, passed by the Chief Judicial Magistrate, Bhiwani in case FIR No.128 dated 02.05.2000 under Sections 452, 447, 506/34 IPC of the Indian Penal Code (for short 'IPC'), registered at Police Station Jhajjar, was partly accepted qua the modification in the sentence part.

As per the prosecution, on 02.05.2000 a complaint was made by Dr. Dilbag Singh to DSP Jhajjar that on 14.04.2000, respondent No.2- Takdir Singh (brother of the complainant) and respondent No.3-Harish Pilonia had trespassed in his house and had also removed his name plate.

After completion of investigation and necessary formalities, challan was presented against respondents No.2 and 3.

Initially FIR was registered under Sections 452, 447 and 506 read with Section 34 of IPC but the trial Court gave a categorical finding that prosecution failed to prove and establish the fact that respondents No.2 and 3 had committed the house trespass; had made preparation for causing hurt to Dr. Dilbag Singh (complainant) or his family members or assaulted or wrongfully restrained them or put them in fear of hurt or of assault or of wrongful restraint. Accordingly, offence under Section 452, 506 IPC were dropped.

Charges were framed against respondents No. 2 and 3 under Sections 447, 451 read with Section 34 IPC to which they pleaded not guilty and claimed trial.

In order to prove its case, the prosecution had examined, as many as 5 witnesses.

After taking into consideration the evidence on record, the Chief Judicial Magistrate, Bhiwani vide judgement and order dated 23.05.2008 convicted the respondents No.2 and 3 under Sections 447 and 451 read with Section 34 of IPC and sentenced them to undergo rigorous imprisonment for a period of one month and to pay a fine of Rs.100/- each and under Section 451 read with Section 34 of IPC and to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.500/- each under Section 451 read with Section 34 IPC. In default of payment of fine, they were further to undergo simple imprisonment for a period of 15 days.

Aggrieved of the said judgment and order, the respondents

No.2 and 3 preferred appeals which came up for hearing before the

Additional Sessions Judge(I), Bhiwani.

During pendency of the appeal before the Additional Sessions Judge, Bhiwani, respondents No.2 and 3 has submitted that they did not want to contest the appeal on merits and wanted to contest the same on the quantum of sentence only and prayed that they be released on probation since they had been facing trial since May, 2000. The complainant moved an application for seeking additional evidence. In the said judgment, both, the respondents No. 2 and 3 alleged that Ram Avtar, Sub Inspector had investigated the case and when he appeared as PW-5 before the trial Court, he did not depose against them. On this, complainant-Dilbag Singh reported the matter to the Superintendent of Police, Jhajjar and wanted to place on record the letter dated 09.06.2008 written by him to the Superintendent of Police, Jhajjar. The said application was dismissed by the appellate Court.

Taking into consideration the prayer of respondents No.2 and 3, the quantum of sentence was modified to the extent to release the respondents No.2 and 3 on probation for a period of one year for commission of offence punishable under Sections 447 and 451 read with Section 34 IPC, subject to their furnishing requisite probation bonds in the sum of Rs.25,000/- with one surety in the like amount each to the satisfaction of the said Court.

However, appeal No. 83 of 2008 preferred by the State titled as ***State Versus Takdir Singh and others*** was dismissed.

Aggrieved of the said judgment, the petitioner has preferred the present revision petition before this Court.

I have heard learned counsel for the parties and have also gone through the record of the Courts below, with their able assistance.

In the present revision the main contention of the petitioner-Dilbag Singh is that the appellate Court had not verified the character and antecedents of respondent No.2 before directing him to be released on probation and thus judgment dated 03.03.2011 to the extent of release of respondents No.2 and 3 on probation, is liable to be set aside.

It has been argued by learned Senior counsel that the Commissioner, Rohtak Division, Rohtak vide order dated 24.04.2002 upheld the order dated 15.08.2000 passed by District Magistrate, Jhajjar, cancelling the arms licence of respondent No.2, while taking into consideration the report submitted by the Superintendent of Police, Jhajjar. Civil writ petition No. 19821 of 2003 filed by respondent No.2 is pending adjudication in this Court. Thus, learned Senior counsel submitted that the respondent No.2 could not be released on probation without calling for the antecedents.

It has been further argued by learned Senior counsel that an appeal No. 83 of 2008 was filed to enhance the sentence awarded to respondents No.2 and 3 for the offence punishable under Section 447, 451 of IPC. However, challenge made with regard to the respondents No. 2 and 3 had been illegally negated by the appellate Court.

In the revision petition before this Court the grounds of appeal No. 83 of 2008 are reproduced which reads as under:-

- "1. That the order of learned lower Court is bad in law as well as on facts.*
- 2. That a FIR No. 128 was lodged on 02.05.2000 against respondents and investigation was made, charge-sheet was submitted and charges were framed u/s 452/447/506/34 IPC in the Court. Allegation of prosecution in brief are that on 02.05.2000 when*

complainant reached at his residential house no. 107/15, new number 156/15, at Jhajjar he saw that accused had uprooted his name plate, which was fixed in the main gate and affixed the name plate of his own name, when complainant asked him not to do so then he had pointed his D.B.B.L. gun towards Dr. Dilbag Singh and threatened him that if he entered into the house, he will be killed. Meanwhile police came and had the police not come, he would have fired at Dr. Dilbag Singh. Accused persons had committed criminal trespass and had removed his name plate and broke photos of first informant fixed in the house. It is also stated that Takdir Singh has also said that he has taken over possession of the house and will not vacate the same. Broken name plate of Dr. Dilbag Singh was taken into possession by police at spot and a D.B.B.L. gun and five live cartridges were recovered from the possession of accused Takdir Singh, respondent No.2.

- 3. That the learned lower Court has failed to appreciate the evidence that accused person armed with D.B.B.L. gun and live cartridges committed house-trespass and put Dr. Dilbag Singh and his wife in fear and committed assault upon them. A perusal of evidence of Dr. Dilbag Singh and PW4 Prem makes out a clear case of Section 452 IPC. It is also relevant to mention that this portion of statement of PW2 and PW4 remained unchallenged by defence.*
- 4. That learned lower Court had committed gross error in not relying on this portion of unchallenged testimony. It is settled law that if accused does not challenge a particular fact, stated by witness, it automatically stands proved.*
- 5. That learned lower Court has also committed gross error in not finding the accused guilty u/s 506 IPC. A perusal of statements of PW2 and PW4 clearly make out*

a case for criminal intimidation with a threat to cause death by D.B.B.L. gun. Police has also recovered gun and live cartridge from the possession of the accused at the spot. This fact also gives support and credence to the allegation of criminal intimidation of prosecution.

It is settled law that FIR is not an encyclopedia and if certain facts are elaborated during examination of a witness, these facts cannot be termed as contradiction, as held by learned lower Court in Para 13 of judgment.

6. That it is also important to note that on 12.03.2000, the complainant moved an application to I.G. Police Rohtak and again on 17.04.2000 to S.P. Jhajjar that accused is continuously threatening the complainant. The attested true copies of the same are filed as Annexures 1 & 2.

In writ petition CM No. 2315/CII of 2002 Dr. Dilbag Singh Vs. Takdir Singh, Hon'ble Justice Ashutosh Mohunta has held that it is proved that there exists a threat to the life of Dr. Dilbag Singh and his family members and it is not safe for them to pursue the litigation with Takdir Singh at Jhajjar. Takdir Singh is stated to be the General Secretary of the Youth Congress at the District level. The attested true copy of said judgment is filed as Annexure-3.

7. That the learned lower court has found while appreciating the evidence of Dr. Dilbag Singh that his entire statement brings a ring of truth and once this impression is formed then it is not required by the court to see deficiency, drawbacks and infirmities of prosecution case.

8. That thus the learned lower court has committed gross error in not punishing the accused person u/s 452/506 IPC.

In the circumstances it is prayed that after giving reasonable opportunity of showing cause to accused

persons their sentences, being inadequate, be enhanced u/s 447, 451 IPC and they also be convicted u/s 452 and 506 IPC."

The learned Senior Counsel appearing for the petitioner lays challenge to the procedure adopted by the learned Appellate Court, while extending the benefit of probation to the accused-respondents. He would argue that the said procedure is in utter violation and negation of the judgment of the Hon'ble Supreme Court in M.C.D. Vs. State of Delhi and another, (2005)4 SCC 605, wherein it was held that before granting benefit of probation to the accused, calling for the report of the Probation Officer regarding the conduct, character and antecedents of the accused, is mandatory. Still further, reliance has also placed upon a Coordinate Bench of this Court in Sushil Kumar Vs. State of Haryana and others, 2018(4) RCR (Criminal) 868.

On the other hand, the learned counsel appearing for the accused-respondents states that the revision petition at the instance of the complainant against the order releasing the accused-respondents on probation is not maintainable. It is further contended that by now the probation period is over and during the said period, there is nothing to indicate that the accused-respondents had ever violated the terms of the probation order. Thus, it is contended that setting aside the order of probation at this stage would cause hardship to the accused-respondents. In support of his contention, the learned counsel has relied upon the judgment of the Kerala High Court reported as M.V. Nalinakshan Vs. M. Rameshan and another, 2009(18) RCR (Criminal) 114; and the judgments of this Court in Harbhajan Singh Vs. Tarlok Singh and others, 1974 PLR 26 and Mewa Singh and others Vs. Darbara Singh and

others, 1987(2) RCR (Criminal) 364.

Learned State counsel has further argued that respondents No.2 and 3 were released on probation vide judgment dated 03.03.2011 and the probation period was of one year which stands completed on 04.03.2012 and it will not be appropriate to interfere in the probation order passed by the appellate Court.

It is further argued that complainant Dr. Dibagh Singh, IAS and respondent No.2 Takdir Singh are real brothers. The civil litigation is also pending between the two brothers and withdrawing the probation order at this stage will cause irreparable loss to respondents No.2 and 3. He has argued that the order of probation may be upheld.

Though in the first instance, the contention regarding non maintainability of the revision at the instance of the petitioner (complainant) appears to be attractive, yet the fact remains that the counsel for the petitioner lays challenge to the procedural aspect and not to the grant of probation. Therefore, I need not deliberate upon the said issue. Even otherwise, the issue regarding maintainability of the revision petition has been dealt with by the Kerala High Court in M.V. Nalinakshan's case (supra). In the said case, the Kerala High Court though held that the revision petition was not maintainable, yet keeping in view the judgment of the Hon'ble Supreme Court in M.C.D.'s case (supra), the probation order was set aside.

In M.C.D.'s case (supra), the Hon'ble Supreme Court held as under:-

“20. We have already reproduced Section 4 of the POB Act. It applied to all kinds of offenders whether under or above 21 years of age. This section

is intended to attempt possible reformation of an offender instead of inflicting on him the normal punishment of his crime. The only limitation imposed by Section 6 is that in the first instance an offender under twenty one years of age, will not be sentenced to imprisonment. While extending benefit of this case, the discretion of the Court has to be exercised having regard to the circumstances in which the crime was committed, the age, character and antecedents of the offender. Such exercise of discretion needs a sense of responsibility. The offender can only be released on probation of good conduct under this section when the Court forms an opinion, having considered the circumstances of the case, the nature of the offence and the character of the offender, that in a particular case, the offender should be released on probation of good conduct. The section itself is clear that before applying the section, the Magistrate should carefully take into consideration the attendant circumstances. The second respondent is a previous convict as per the records placed before us. Such a previous convict cannot be released in view of Section 4 of the POB Act. The Court is bound to call for a report as per Section 4 of POB Act but the High Court has failed to do so although the Court is not bound by the report of the Probationer Officer but it must call for such a report before the case comes to its conclusion. The word "shall" in sub-section (2) of Section 4 is mandatory and the consideration of the report of the Probationer Officer is a condition precedent to the release of the accused as reported in the case of State v. Naguesh G. Shet Govenkar and Anr., AIR (1970) Goa 49 and a release without such a report would, therefore, be illegal.

21. *In the case of Ram Singh and Ors. v. State*

of Haryana, (1971) 3 SCC 914, a Bench of two Judges of this Court in paragraph 16 of the judgment observed as under :

"Counsel for the appellants invoked the application of Probation of Offenders Act. Sections 4 and 6 of the Act indicate the procedure requiring the Court to call for a report from the Probation Officer and consideration of the report and any other information available relating to the character and physical and mental condition of the offender. These facts are of primary importance before the Court can pass an order under the Probation of Offenders Act. This plea cannot be entertained in this Court."

22. *In the case of R. Mahalingam v. G. Padmavathi and Anr., (1979) CrL LJ NOC 20 Mad., the Court observed as under :*

"If any report is filed by the probation officer, the Court is bound to consider it. Obtaining such a report of the probation officer is mandatory since the sub-s.(1) of S. 4 says that the Court shall consider the report of the probation officer. Words "if any" do not mean that the Court need not call for a report from the probation officer. The words "if any" would only cover a case where notwithstanding such requisition, the probation officer for one reason or other has not submitted a report.

Before deciding to act under S. 4 (1), it is mandatory on the part of the Court to

call for a report from the probation officer and if such a report is received, it is mandatory on the part of the Court to consider the report. But if for one reason or the other such a report is not forthcoming, the Court has to decide the matter on other materials available to it.

In the instant case, the Magistrate passed order releasing the accused on probation without taking into consideration their character. Held, the requirement of S. 4(1) was not fulfilled and therefore the case remanded."

A Coordinate Bench of this Court, in Sushil Kumar's case (supra), while relying upon the aforesaid judgment of the Hon'ble Supreme Court, set aside the judgment passed by the Additional Sessions Judge, Fatehabad to the extent of releasing the accused on probation and remanded the matter to the lower Appellate Court for passing a fresh order with regard to the sentence part, after calling for the report of the probation officer.

In view of the above, the judgment dated 3.3.2011 passed by the Additional Sessions Judge, Bhiwani, is set aside to the extent of releasing the accused-respondents on probation. The matter is remanded to the learned Additional Sessions Judge, Bhiwani. The lower Appellate Court may call for the report of the Probation Officer with regard to previous antecedents of the accused/convicts and then after hearing counsel for the parties pass a fresh order with regard to the sentence part. It may be clarified here that the Lower Appellate Court would not be debarred from granting benefit of probation to the accused/convicts, if after calling for and perusing report of Probation

Officer, it is convinced that case for grant of benefit of probation to the accused/convicts is made out. The parties through their counsel are directed to appear before Lower Appellate Court on 4.12.19 at 10:00 a.m. The lower Appellate Court may complete the exercise within a period of two months from the date of receipt of certified copy of the order.

Petition stands disposed of in the above terms.

22.10.2019

pooja saini

(HARNARESH SINGH GILL)
JUDGE

Whether speaking/reasoned?

Yes/ No

Whether reportable?

Yes/No