

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

**1. CRA S-1180-SB of 2005 (O&M)
Date of Decision: 14.03.2023**

State of Haryana ...Appellant
Versus
Messar and others ... Respondents

**2. Criminal Revision 1932 of 2005 (O&M)
Date of Decision: 14.03.2023**

Janardhan ...Revisionist
Versus
Messar and others ... Respondents

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Ms. Sheenu Sura, DAG, Haryana.

Mr. Rahul Vats, Advocate
for the petitioner in Criminal Revision 1932 of 2005.

Respondents No. 1, 2 and 6 died.

Mr. Ramesh Hooda, Avdocate
for respondents No. 3 to 5.

N.S.SHEKHAWAT, J.

This judgment shall dispose off above mentioned two cases as the common question of facts and law are involved. By way of filing the criminal appeal, i.e. CRA S-1180-SB of 2005 titled as **“State of Haryana Vs. Messar and others”**, the State of Haryana has prayed for setting aside the impugned order of sentence dated 02.05.2005 passed the learned Judicial Magistrate 1 Class, Karnal, whereby, the repsoondens were ordered to be released on probation of good act and conduct and prayed for awarding of sentence as per law under Sections 326, 324, 447 and 148 IPC. In Criminal Revision 1932 of 2002 titled as **“ Janardhan Vs. Messar and others”**, similar prayer has been made by the complainant for modification of the

order of sentence and further prayer has been made for awarding the suitable compensation to the injured under Section 357 Cr.P.C.

The factual controversy is not at all in dispute in the present cases. Vide judgment dated 02.05.2005, the Court of learned Judicial Magistrate 1st Class, Karnal, convicted the respondents for commission of the offences punishable under Sections 323, 324, 325, 326, 148 read with Section 149 IPC. However, while awarding the sentence, the learned trial Court granted the relief of probation to the respondents/convicts on the ground that the incident was 14 years old and there was no reason as to why the old wounds should be opened. Consequently, the respondents/convicts were ordered to be released on probation of good act and conduct on their furnishing probation bonds in the sum of Rs. 15,000/- with one surety in the like amount each for a period of 6 months. On the same day, the probation bonds were furnished, accepted and attested by the learned trial Court. It further requires mention that the respondents/accused chose not to prefer the appeals before this Court, challenging their conviction by the learned trial Court. It also requires mention that during the pendency of the above mentioned cases before this Court, respondents No. 1, 2 and 6 have already expired and only respondents No. 3 to 5 are alive and have chosen to contest the present cases. The only contention raised by the leaned Staet counsel assisted by the learned counsel for the complainant is that in the present case, the respondents were convicted under Sections 323, 324, 325, 326, 148 read with Section 149 IPC and the offence under Section 326 IPC is punishable imprisonment for life or imprisonment for 10 years and fine.

Consequently, private respondents/accused/convicts could not have

been released on probation in view of Section 4 of the Probation of Offender Act. Since the offence under Section 326 IPC was punishable with imprisonment for life also, so the benefit of probation was wrongly extended to the respondents. Consequently, a prayer has been made that impugned order of sentence may be set aside and the respondents may be suitably punished and the compensation may also be granted to the injured.

I have heard learned counsel for the parties and with their able assistance, I have gone through the record carefully.

For the better appraisal of the facts and the law, it would be appropriate to reproduce the relevant Sections of Code of the Criminal Procedure, 1973, Indian Penal Code and Probation of Offenders Act 1958.

Section 326 of Indian Penal Code

326. Voluntarily causing grievous hurt by dangerous weapons or means

Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with a [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Section 360 of Code of Criminal Procedure, 1973**360. Order to release on probation of good conduct or after admonition**

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

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the

proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by Sub-section (2).

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

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

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

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law.

Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

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

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

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his

recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence. (10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958, or the Children Act, 1960, or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders

"Sections 4 & 11 of the Probation of Offenders Act, 1958

4. Power of court to release certain offenders on probation of good conduct

(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

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

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

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

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

11. Courts competent to make order under the Act, appeal and revision and powers of courts in appeal and revision

(1) Notwithstanding anything contained in the Code or any other law, an order under this Act, may be made by any court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court when the case comes before it on appeal or in revision.

(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.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the court by which he is found guilty declines to deal with him under section 3 or section 4, and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any other law, the court to which appeals ordinarily lie from the sentences of the former court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under section 3 or section 4 in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law: Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the court by which the offender was found guilty.

The Hon'ble Supreme Court has held in catena of judgments that taking into consideration the provisions of sub-section 10 of the Section 360 of Code of the Criminal Procedure 1973 and Section 12 of the Probation of Offenders Act 1958, which commences with the non-abstante clause held that both the statutes have significant differences and co-existence would lead to anomalous results. However, certainly, the Act of 1958 has, thus, an edge over Section 360 of the Code of Criminal Procedure, 1973. In the instant case also, while passing the impugned order of sentence, the learned trial Court has not referred to any provision of law, while granting the relief of probation to the respondents/convicts. The impugned order is completely silent in this regard and the trial Court did not specifically mention that the order was passed by exercising its jurisdiction under Section 360 of the Code of the Criminal Procedure or the order was passed in exercise of powers under Sections 3 and 4 of the Probation of Offenders Act, 1958.

However, the Hon'ble Supreme Court has repeatedly held in number of judgments that in cases, where a person is accused of an offence punishable with life imprisonment, he is disentitled for the grant of benefit of probation either under Section 360 of Code of Criminal Procedure 1973 or under Section 4 of the Probation of Offenders Act 1958. The Apex Court in the matter of **Ramesh Dass Vs. Raghu Nath AIR 2008 (SC), 1298** relied upon the law laid down in the matter of **Channi Vs. State of Uttar Pradesh, 2006 (5) SCC, 396** and **Daljit Singh Vs. State of Punjab through Secretary Home Affairs 2006 (6) SCC 159** and held as follows;-

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

6. Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the Probation Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for Probation Officers in assisting the Courts in relation to supervision and other matters while Probation Act does make such a provision.

While Section 12 of the Probation Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the Probation Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain

parallel provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anomalous results. The intention to retain the provisions of Section 360 of the Code and the provisions of the Probation Act as applicable at the same time in a given area cannot be gathered from the provisions of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force, the provisions of Section 360 of the Code are wholly inapplicable.

7. Enforcement of Probation Act in some particular area excludes the applicability of the provisions of Sections 360, 361 of the Code in that area.

8. The aforesaid position was highlighted in Chhanni v. State of U.P., 2006(3) RCR (Criminal) 753 : 2006(2) Apex Criminal 666 : (2006(5) SCC 396) and Daljit Singh and Ors. v. State of Punjab, 2006(3) RCR (Criminal) 868 : 2006(2) Apex Criminal 701 : (2006(6) SCC 159).

9. Further, Section 360(1) of the Code itself provides that if for any offence life sentence is provided for, section 360 of the Code would have no application.

Consequently, both the above provisions namely Section 4 of the Act 1958 and Section 360 of the Code of Criminal Procedure, 1973 though operate for the subject pertaining to the grant of benefit to the offenders, but at the same time the said provisions are mutually exclusive. It is trite to observe that in view of above referred pronouncements, the offenders of the offences punishable for life imprisonment must not be extended the benefit of probation of Offenders Act and the law is no more *res-interga* on the subject.

Thus, the benefit of probation was wrongly extended to the respondents in the instant case by the learned trial Court. The benefit extended to the accused was not only contrary to the mandatory provisions of Section 4 of the Act of 1958 but also was contrary to the law laid down by the Hon'ble Supreme Court in numerous judgments. The offence under Section 326 IPC prescribes sentence of life imprisonment and the respondents were wrongly granted the benefit of probation and, accordingly, the impugned order of sentence deserves to be set aside by this Court.

I have otherwise perused the evidence on record and the impugned judgment of conviction with the assistance of the learned counsel for the parties and find no reasons to set aside the conviction of the respondents/accused. However, this Court is cognisant of the fact that the occurrence in the instant case had taken place on 12.08.1991, i.e., about 32 years ago. Even during the pendency of the present appeal respondents No. 1, 2 and 6 have expired. Still further, the respondents were granted the benefit of probation, even though, illegally. Consequently, the impugned order of sentence is set-aside and the respondents are sentenced till the rising of the Court, as laid down by the Hon'ble Apex Court in the matter of **Goverdhan Dass Vs. Chaman Lal and others 2019 (2) RCR (Criminal) 655**. Further, taking into account the serious injuries suffered by the injured, the respondents No. 3 to 5 are directed to pay an amount of compensation of Rs. 50,000/-each to the injured/legal heirs of the injured, in case the injured is dead; which shall be deposited by the respondents No. 3 to 5 with the concerned Chief Judicial Magistrate within a period of

respondents No. 3 to 5, as mentioned above, they shall undergo simple imprisonment for three months.

The appeal as well as the criminal revision stand disposed off accordingly.

All pending applications, if any, are disposed off, accordingly.

The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

Records of the Court below be sent back.

14.03.2023
amit rana

(N.S.SHEKHAWAT)
JUDGE

Whether reasoned/speaking : Yes/No
Whether reportable : Yes/No