

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

**CRA-S-1766-SB-2017
Date of Decision: 20.07.2023**

Avinash Sahota @ Shera and another

. . . . Appellants

Vs.

State of Punjab

. . . . Respondent

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Present: - Mr. Jasraj Singh, Advocate, for the appellants.

Mr. Parneet Singh Pandher, AAG, Punjab.

DEEPAK GUPTA, J.

In Sessions Case No.RBT No.45 of 2016 (CNR No.PBH001-000917-2016) arising out of FIR No.160 dated 07.10.2015 registered at Police Station Garhshankar, District Hoshiarpur, the appellants faced trial for committing the offences punishable under Sections 304 & 506 read with Section 34 IPC. After trial, though they were acquitted of the charge under Section 304 IPC, but the appellant Avinash Sahota @ Shera @ Tikka was convicted for committing offence under Section 323 IPC; whereas appellant Gurmukh Singh @ Ravi was convicted for committing offence under Section 323/34 IPC, vide judgment dated 07.04.2017. Vide a separate order of even date, both the appellants were sentenced to undergo rigorous imprisonment for a period of one year each for committing the aforesaid offence.

2. Against the aforesaid judgment of conviction and order of sentence, this appeal has been preferred, on various grounds.

3. Before this Court, learned counsel for the appellants submitted that he does not want to press appeal against conviction and that he confines his prayer for granting the benefit of probation to the appellants in view of Sections 360 and 361 Cr.P.C. It is contended by learned counsel that once the appellants were convicted only for offence under Section 323 IPC, it was incumbent upon the trial Court to give reasons for not giving the benefit of probation under Sections 360 & 361 Cr.P.C. and the Probation of Offenders Act, 1958. Learned counsel has relied upon the a decision of Hon'ble Supreme Court rendered in *Elamma and another Vs. State of Karnataka* 2009(2) RCR (Criminal) 47.

4. Opposing the prayer, it is pointed out by learned State counsel that both the appellants were tried for committing offence under Section 304 IPC. Though the charge under Section 304 IPC was not proved, but it is after considering the facts and circumstances of the case that the appellants were sentenced to undergo rigorous imprisonment for a period of one year after holding them guilty under Section 323 IPC and so, in these circumstances, they are not entitled to be given the benefit of probation.

5. Perusal of the order dated 07.04.2017, qua the quantum of sentence, reveals that plea of probation is not considered at all by the Ld. Trial Court.

6. Sections 360 & 361 of the Cr.P.C. read as under: -

360. Order to release on probation of good conduct or after admonition. - (1) *When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty - one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no*

previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour:

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

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

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years, imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was

committed, instead of sentencing him to any punishment, release him after due admonition.

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

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

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

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

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

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

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

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960) or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

361. Special reasons to be recorded in certain cases. *Where in any case the Court could have dealt with,—*

(a) an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958); or

(b) a youthful offender under the Children Act, 1960 (60 of 1960) or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so.”

7. In the case of ***Elamma and another*** (Supra), it has been held by Hon’ble Supreme Court that reading of Sections 360 & 361 Cr.P.C. together would indicate that in any case where the Court could have dealt with an accused under Section 360 Cr.P.C. and yet does not want to grant the benefit of the said provision, then it has to record in its judgment by giving specific reasons for not having done so and it is the mandatory duty of the Court. In that case before the Hon’ble Supreme Court, the accused woman faced trial for killing her husband, who was addicted to alcohol and had behaved badly. Accused was convicted under Section 304 Part II IPC and sentenced to 4 years rigorous imprisonment. Upholding the conviction, Hon’ble Supreme Court remitted the matter to the trial Court for limited purpose for deciding whether the benefit under Section 360 Cr.P.C. could be extended to the appellants.

8. In ***Daljit Singh and others Vs. State of Punjab through Secretary Home Affairs, 2006(3) RCR (Criminal) 868***, conviction was recorded by the Court under Section 324 IPC. The question of release of the accused on probation was not considered. It was held by Hon’ble Supreme Court that it was obligatory for the Court to consider the said plea.

9. This Court in *Balbir Singh and another Vs. State of Punjab, 2013(3) RCR (Criminal) 953* has also held that Court is required to give special reasons for not granting the benefit of Probation of Offenders Act, 1958, in case the matter could have been dealt with under Section 360 Cr.P.C. Similar view has been taken by this Court in *Akhtar and another Vs. State of Haryana, 2013(8) RCR (Criminal) 2992* and in *Rajesh alias Pappu Vs. State of Haryana, 1996(1) RCR (Criminal) 394*.

10. In view of the legal position as above, the conviction of the appellants is maintained, as appeal against the conviction has not been pressed. However, matter is remitted back to the trial Court concerned to consider the plea of the appellants for releasing them on probation, in accordance with law.

11. Accordingly, appeal is disposed of with a direction to the appellants to appear before the trial Court within 15 days from the date of receipt of this order.

(DEEPAK GUPTA)
JUDGE

20.07.2023

Vivek

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| 1. Whether speaking/reasoned? | Yes/No |
| 2. Whether reportable? | Yes/No |