
(1973) 07 OHC CK 0015
In the Orissa High Court

Gouranga Charan Bhol

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 31-07-1973

Acts Referred:

Penal Code, 1860 (IPC) — Section 323, 325, 341
Probation of Offenders Act, 1958 — Section 11, 3, 4, 6

Citation : (1973) 39 CLT 955 : (1974) CriLJ 955

Hon'ble Judges : G.K. Misra, C.J

Bench : Single Bench

Judgement

G.K. Misra, C.J.—Late Uchhaba and Udaya-natih are brothers. Udayanath has two sons Nityananda (opp. party No. 1) and Gouranga (P. W. 1). Gouranga is the adopted son of Uchhaba. Pari Dei (P. W. 2) is the wife of Udayanath. Ichhamani (Opp. party No. 2) is the wife of Nityananda. Pitei (Opp. Party No. 3) is the mother of Ichhamani. Prosecution case is that on 11th. of December, 1969 there was a quarrel between Nityananda and P.W. 2 over the removal of some bricks by Nityananda. In course of the Quarrel Nityananda assaulted his mother P.W. 2. P.W. 1 told Udayanath left hand and the other on the head. P.W. 2 in his presence. Nitvananda came out from his house with a bamboo lathi and dealt two blows on P.W. 1 one on his left hand and the other on the head P.W. 1 fell down on the ground P.W. 8 intervened. Then Petei caught hold of P.W. 2 while Ichhamani dealt a blow on P.W. 2 by means of a spade. After medical examination P.W. 1 lodged information at Jagatsingpur police Station on 12-12-1969 at about 11.30 a. m. The opposite parties denied their connection with the occurrence. Their defence is that R W. 1 quarrelled with Udayanath and while he was rushing towards Udayanath to assault him P.W. 1 stumbled and fell down on stone rings and got himself injured. They pleaded ignorance of the injuries on P.W. 2.

2. The learned Magistrate accepted the prosecution story and found Nityananda guilty under Sections 325 and 323 I. P. Q. and sentenced him to undergo R. I. for one month and to pay a fine of Rs. 250/- on each count; in default to undergo R. I. for further two months. The sentences were directed to run consecutively.

Ichhamani was convicted under Sections 323 I.P.C. and Pitei u/s 341 1PC. Both of them being females were released after due admonition u/s 3 of the Probation of Offenders Act. 1958 (hereinafter to be referred to as the Act).

All the three accused carried an appeal before the Sessions Judge. Cuttack, which was ultimately heard by the learned Additional Sessions Judge. The learned Judge held that the fracture of the left hand of P.W. 1 had not been proved beyond reasonable doubt by the prosecution. He accordingly set aside the conviction of opposite party No. 1 u/s 325 I.P.C. but upheld his conviction u/s 323 IPC. He affirmed the conviction of Ichhamani and Pitei under Sections 323 and 341 I.P.C. respectively. He did not interfere with the order of the learned S.D.M. releasing both of them u/s 3 of the Act. So far as Nityananda is concerned he held that the parties are very close relations and that the act of assault was perpetrated without any pre-meditation. Accordingly he released Nityananda u/s 4(1) of the Act on his executing a bond for a period of one year for Rs. 1, 000/- with one surety for the like amount and he was directed to be placed under the supervision of the District Probation Officer, Cuttack.

Though the appeal was allowed in (Part as the conviction u/s 325 IPC was set aside the learned Addl. Sessions Judge wrote that the appeal was dismissed with the modification in the sentence.

3. Opposite parties have not come up in revision challenging the conviction In this revision Mr. Mohanty also does not challenge the validity of the conviction. Thus the conviction of all the three opposite parties under the different sections as found by the learned Judge stands.

4. As both the courts below have released Ichhamani and Pitei u/s 3 of the Act I do not propose to examine the correctness of that decision.

5. The only question for consideration is whether Nityananda should be released on probation u/s 4(1) of the Act. It is to be noted that P.W. 1 was the informant and the State was conducting the prosecution. The State has not filed any revision. The revision has been filed by P.W. 1. A question was accordingly raised whether the criminal revision at the instance of the informant is competent. The question is however, academic inasmuch as the fact having been brought to the notice of this Court the same can be treated as a suo motu revision. I treat it as a suo motu revision and it is not therefore necessary to examine whether the revision is entertainable at the instance of the informant.

6. Section 11(4) of the Act lays down that when an order has been made u/s 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. The High Court has therefore ample jurisdiction to interfere in revision with the impugned order. The next question for consideration is whether the learned Addl. Sessions Judge exercised his powers u/s 4(1) of the Act in accordance with law. Section 4 (11 and (2) runs thus

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-article. (1). the Court shall take into consideration the report if any of the probation officer concerned in relation to the case.

7. It is to be noted that Sub-section (2) is mandatory. 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. Admittedly no report of the probation officer was called for in this case and accordingly the order of the learned Addl. Sessions Judge u/s 4(1) of the Act releasing Nityananda on probation is contrary to law.

This view is supported by a Single Judge decision of the Mysore High Court in 1964 (1) Cri LJ 460 (Mys) (State of Mysore v. Saib Gunda). The matter is concluded by a decision of the Supreme Court reported in Ram Singh v. State of Haryana, 1972 SCC 162 . In paragraph 16 of that judgment their Lordships observed thus:

x x x x Section 4 and Section 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.

The impugned order of the learned Addl. Sessions Judge releasing Nityananda on probation u/s 4(1) of the Act is liable to be set aside on this simple ground.

8. Section 4(1) of the Act lays down certain principles to be followed before the power is exercised. The Court by which the person is found guilty must have the 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. The expression "nature of the offence and the character of the offender" does not lay down any clear test. The matter was examined by this Court in *Bisikesan Suna Vs. The State*, . Therein an exposition of the meaning of this expression was given, in paragraph 4 of that judgment the following observation occurs:

xx xx The further question for consideration is to find out the meaning of the expression "the circumstances of case including the nature of the offence and the character of the offenders" as used in Sections 3, 4 and 6 of the Act. An expression almost in similar language, has been used in Section 562 (1) Criminal P. C which is to the effect "regard being had to the age character or antecedent of the offender and to the circumstances under which the offence was committed." This expression has received judicial construction in several well known authorities. The tests laid down under that section are that the exercise of power under the section is entirely in the discretion of the Court to be exercised according to the circumstances of each case. The fact that an offender is a first or a youthful offender is by itself not sufficient to invoke the section. Both the conditions are the first essentials without which the section would have no application. Further restriction has been imposed after a youthful offender commits a first offence. The section is generally made applicable where a youthful first offender succumbs to sudden temptation or uncontrollable impulses or does a thoughtless act or acts under the influence of others. The section is not to be applied to cases where the act was of daring and reprehensible nature or the commission of the offence implied previous preparation or deliberate effort on the part of the accused or where the conduct shows a design or a general character of craft and deceit. It is not necessary to refer to various authorities dealing with the aforesaid tests. Neither it is possible to give a comprehensive enumeration to cover all cases. The tests u/s 562 (1) Criminal P.C. are applicable to Sections 3, 4 and 6 of the Act more liberally x x x x

The learned Judge does not seem to have fully applied his mind to the aforesaid tests. On this ground also his judgment is liable to be set aside. Merely because the parties are near relations and the accused acted on the spur of the moment Section 4(1) of the Act cannot be invoked. Here Nityananda assaulted P.W. 1 merely because he lodged a protest to his natural mother being assaulted by opp. party No. 1.

9. As I have already stated obtaining a report from the probation officer u/s 4(2) of the Act is mandatory. No such report is before me In the circumstances Nityananda assaulted P.W. 1 and did not resist the assault on his mother by his wife and mother-in-law this is not a fit case in which Section 4(1) of the Act should be applied. It is not necessary to call for a report u/s 4(2) of the Act. I accordingly quash the impugned order to the extent it releases Nityananda on probation u/s 4(1).

10. Taking into consideration the fact that the parties are near relations and the assault was made on the heat of the moment as stated by the learned Judge. 1

set aside the substantive sentence of imprisonment imposed by the learned Magistrate and impose a fine of Rs. 300/-on Nityananda in default he would undergo S.I. for one month.

11. The criminal revision is allowed as indicated above.