

(1989) 05 SHI CK 0023

In the High Court Of Himachal Pradesh

Case No : Criminal Appeals No's. 50 and 24 of 1982

State of Himachal Pradesh

APPELLANT

Vs

Lat Singh and Others

RESPONDENT

Date of Decision : 05-05-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 360, 360(10), 361, 380, 562
General Clauses Act, 1897 — Section 8(1)
Probation of Offenders Act, 1958 — Section 1(3), 12, 14, 18, 19
Punjab Excise Act, 1914 — Section 61(1)

Citation : (1990) CriLJ 723 : (1989) 2 ShimLC 81

Hon'ble Judges : V.P. Bhatnagar, J;V.K. Mehrotra, J;Bhawani Singh, J

Bench : Full Bench

Advocate : Inder Singh, General, M.S. Chandel and M.S. Guleria and S.S. Kanwar, in Cr. Appeal No. 24 of 1982, for the Appellant; S.S. Kanwar in Cr. Appeal No. 50 of 1982, for the Respondent

Judgement

V.P. Bhatnagar, J.—(On behalf of Bhawani Singh, J. and himself).

"What is the effect of Sections 360 and 361 of the Code of Criminal Procedure, 1973 vis-a-vis the provision of the Probation of Offenders Act, 1958? Is Section 360 inapplicable to the State of Himachal Pradesh as the Probation of Offenders Act, 1958 has been brought into force?"

are the questions referred by a Division Bench of this Court to a larger Bench for determination. We propose to answer these questions by this judgment.

2. The question as framed per se indicates that the provisions of the Probation of Offenders Act, 1958 (hereinafter referred to as "the Act") apply to the entire area comprised in the State of Himachal Pradesh. This is not disputed.

3. That the analogous provisions pertaining to release on probation of good conduct or after admonition contained in Section 562 of the Code of Criminal Procedure, 1898 (for short, "the 1898 Code") stood superseded by those

contained in the Act is also beyond the pale of controversy. This conclusion flows from the bare language of Section 19 of the Act. It reads:

"19. Section 562 of the Code not to apply in certain areas. Subject to the provisions of Section 18, Section 562 of the Code shall cease to apply to the State or parts thereof in which this Act is brought into force."

Section 18 of the Act saves the operation of certain enactments and has no bearing on the matter in hand. Therefore, the intendment of the Legislature at the time of promulgation of the Act clearly was that in the areas wherein the Act was to be brought into force, Section 562 of the 1898 Code will become inapplicable and matters relating to release on probation would thereafter be exclusively governed by the law contained in the Act.

4. The 1898 Code was repealed by the Code of Criminal Procedure, 1973 (for short, the 1973 Code). It received the assent of the President of India on January 25, 1974 but came into force w.e.f. the 1st day of April, 1974. Section 562 of the 1898 Code has been replaced by Section 360 of the 1973 Code, dealing with release of offenders on probation.

5. As discussed above, there can be no two opinions regarding the inapplicability of Section 562 of the 1898 Code prior to April 1, 1974 in the areas where the Act had been enforced. What requires determination, however, is the effect of Section 562 of the 1898 Code having been substituted with some modifications by Section 360 of the 1973 Code vis-a-vis the provisions of the Act from April 1, 1974 onwards.

6. It is here that the provisions of Section 8(1) of the General Clauses Act, 1897 have to be pressed into aid. Section 8(1) runs as follows :-

"Where this Act or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

The conditions for the application of Sub-section (1) of Section 8, *ibid* can be stated thus:

(a) The General Clauses Act or any Central Act or Regulation made after the commencement of the General Clauses Act must repeal and re-enact, with or without modification, any provision of a former enactment;

(b) A reference to the provision of the former enactment must be contained in any other enactment or in any instrument; and

(c) There should be absence of any intention to the effect that reference in the other enactment or instrument will not be considered as a reference to the provision so re-enacted.

7. In the instant case, it goes without saying that conditions (a) and (b) are fulfilled. The 1973 Code is a Central Act made after the commencement of the General Clauses Act and it repeals and re-enacts with some modification Section 562 of 1898 Code, that is, a provision of a former enactment. The re-enacted provision is Section 360. This fully accounts for condition (a). Condition (b) is also met inasmuch as a reference of Section 562 of the 1898 Code - a former enactment - is contained in any other enactment, viz., Section 19 of the Probation of Offenders Act.

8. As regards condition (c) also, there is no expression of legislative intendment anywhere that reference to Section 562 of the 1898 Code in Section 19 of the Act will not be considered reference to Section 360 of the 1973 Code, which is the re-enacted provision. However, some difficulty is presented by the language of Sub-section (10) of Section 360, which reads:

"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."

The argument is that the question of affecting or not affecting the provisions of the Act by Section 360 of the 1973 Code can only arise if it was within the contemplation of the Legislature that both these provisions relating to the release of offenders on probation could coexist. The upholding of such an argument, in our view, would amount to straining the language too far. If such an intention was there, it could have been expressed more directly. It is also a well known principle of interpretation of statutes that there is a presumption against Legislature intending what is unreasonable or inconvenient or absurd. It is difficult to understand, much less appreciate, how two different provisions of law on the same subject can be permitted to apply to one and same area at the same time. Such a situation would certainly result in confusion in the matter of extending benefit of releasing offenders on probation. For example, where a male not under twenty one years of age is convicted of an offence punishable with imprisonment for a term of more than seven years but not punishable with death or imprisonment for life, he cannot be released at all on probation of good conduct u/s 360 of the 1973 Code but can be so released u/s 4 of the Act which makes no distinction on the basis of age or sex. The law cannot but frown upon such a state of uncertainty. Therefore, wherever possible, placing an interpretation on a Statute which introduces an element of uncertainty about the identity of law applicable in a given area has to be avoided.

9. The reason why the Legislature Has allowed two different sets of law to remain on the Statute Book is not far to seek. The provisions of the Probation of Offenders Act, 1958 are more beneficial and result-oriented and wider in scope and applicability for "the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effects of jail life" than the provisions of Section 360. Therefore, an

option has been given to the State Governments to apply or not to apply the provisions of the Act to the areas falling within their territory, presumably keeping in view their respective law and order situation. No such option has been given as regards Section 360 which has been made applicable, broadly speaking, to the whole of India except the State of Jammu and Kashmir. Consequently, Section 360 would be applicable to a State or an area within a State to which the provisions of Probation of Offenders Act have not been brought into force by way of a notification as postulated in Section 1(3) of the Act.

10. Cumulatively, therefore, there is no escape from the conclusion that all the three conditions enumerated above exist so that reference to Section 562 of the 1.898 Code in Section 19 of the Probation of Offenders Act, 1958 will have to (be) read as a reference to Section 360 of the 1973 Code. If so, it would follow as a necessary corollary that Section 360 would become inapplicable to a State wherein Probation of Offenders Act has been brought into force. Therefore, State of Himachal Pradesh Vs. Shakti Parshad, is no good law to the extent it intermingles the provisions of Section 360 and the Act and thereby impliedly leads to an inference that both provisions can co-exist and made applicable alternatively.

11. The case law cited from both sides may now be briefly dealt with.

12. In the conclusion arrived at, we are fortified by the decisions of Punjab High Court in Gurbachan Singh and Others Vs. State of Punjab and Another, and State of Punjab Vs. Harbans Lal, Kerala High Court in State of Kerala Vs. Chellappan George and Another, and Karnataka High Court in B.S.M. Ganganna Vs. State of Karnataka and Others, . No case to the contrary has been cited before us directly touching this point.

13. Joginder Singh Vs. The State of Punjab, which is an authority for the proposition that minimum sentence presented u/s 61(l)(c) of the Punjab Excise Act is no bar to the applicability of Section 360 of the 1973 Code or, in the alternative, to the Act. No help can, therefore, be derived from Keshav Sitaram Sali Vs. State of Maharashtra, Keshav Sitaram v. State of Maharashtra. In that case, appellant Keshav Sitaram, an employee of the Railways, was alleged to have abetted commission of theft of coal worth Rs. 8/- from railway goods wagon. The High Court, accepting the appeal against his acquittal, sentenced him to pay a fine of Rs. 500/- and in default of payment of fine to suffer rigorous imprisonment for two months. Even after his conviction, the appellant was taken back to duty by the Railways. Keeping in view the special circumstances of the case and the character and antecedents of the appellant, the Supreme Court, in appeal, set aside the sentence imposed and remitted the case to the trial Court with the direction to extend to the appellant the benefit of either Section 360 of the Code of Criminal Procedure or Sections 3 and 4 of the Probation of Offenders Act and pass an appropriate order. Thus, the Supreme Court in that case did not consider at all as to which of the two provisions applied to the State of Maharashtra to the exclusion of the other. No assistance, therefore, is available

from Keshav Sitaram for the purpose of resolving the controversy which is the subject-matter of the reference before us.

14. Some other cases have also been relied on by Mr. S.S. Kanwar to show that High Courts have proceeded u/s 360 of the 1973 Code in spite of the fact that the provisions of the Act had been brought into force in those States. We have invariably" found that this was done without considering the points in issue before us. No useful purpose will be served by referring to those cases.

15. Next, we may deal with the effect of Section 361 of the 1973 Code vis-a-vis the provisions of the Act. Section 361 reads as follows :

"361. Special reasons to be recorded in certain cases.- Where in any case the Court would have dealt with.-

(a) an accused person u/s 360 or under 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."

The above Section contains a mandate to the Courts to record in the judgments special reasons for not dealing with the accused person u/s 360 or under the Provisions of the Act where this could have been done. This provision plainly supplements provisions of the Act and there is no conflict between the two.

16. In view of the above discussion, our answer to the reference made by the Division Bench is that Section 360 of the Code of Criminal Procedure, 1973 is inapplicable to the State of Himachal Pradesh as the Probation of Offenders Act has been brought into force. Section 361, however, applies with full force requiring Courts to record special reasons for not applying the provisions of the Probation of Offenders Act to a case where the Court could have dealt with the accused under the said provisions.

17. We have answered the questions referred to us. The appeals may now be placed before the Division Bench for disposal.

V. K. Mehrotra, J. (Concurring)

18. I agree with my brethren in the answer proposed to the question which are before this Full Bench for consideration. I would only like to add a few words of my own.

19. It is not in doubt that the Probation of Offenders Act, 1958, is a beneficial piece of legislation. It is a special Act. It is an Act to provide for the release of offenders on probation or after due admonition and for matters connected therewith. This is what the Preamble to the Act says. The statement of Objects

and Reasons of the Bill, leading to this Act, (published in the Gazette of India, Extraordinary, dated November 11, 1957, in Part II, at page 842 of Section 2) says that:

"....there has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effects of jail life....

It is proposed to empower Courts to release an offender after admonition in respect of certain specified offences. It is also proposed to empower Courts to release on probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life. In respect of offenders under 21 years of age, special provision has been made putting restrictions on their imprisonment. During the period of probation, offenders will remain under the supervision of probation officers in order that they may be reformed and become useful members of the society."

20. Section 360 of the Code of Criminal Procedure, 1973, incorporates the provisions of Sections 562, 563, 564 and 380 of the earlier Code of the year 1898, with some changes. The object of the Legislative changes brought about by Section 360 is also to enlarge the scope of the provision relating to release of an offender on probation of good conduct or admonition in comparison to Section 562 of the earlier Code. However, Section 360 is a part of the Code of Criminal Procedure which regulates the procedure for trial of criminal cases generally. It is not a part of any specific law relating to the release of offenders on probation of good conduct like the Probation of Offenders Act, 1958.

21. In *State of Punjab Vs. Harbans Lal*, the distinctive features which indicate the more beneficial nature of the provisions of the Probation of Offenders Act, have been succinctly mentioned in paragraph 11 of the report. Briefly stated, the advantages, which the provisions of the Probation of Offenders Act have over those of Section 360 of the Code, consist in the fact that specific areas are chosen by the State Government for applying the Act having regard to the social, economic and political conditions of its population as also their character, moral fibre, law awareness, educational facilities, employment opportunities, developmental conditions, mobility and such like factors. Unlike Section 360 of the Code, offenders can be released under Sections 4 and 6 even where he has had a previous conviction. The conviction for which offenders are released on probation for good conduct under the Probation of Offenders Act does not attract any disqualification as is clear from Section 12. There is no provision like Section 12 of the Offenders Act in the Code. The Court cannot ask the offender to pay the expenses properly incurred for the prosecution or to pay compensation for any loss or injury caused to any person by the commission of the offence where it releases a person u/s 360 of the Code. Section 5 of the Offenders Act authorises the Court to require the released offender to pay compensation for loss or injury caused to any person by the commission of the offence as also costs of the proceedings as may be assessed and imposed. These ancillary orders

are part and parcel of the framework of probation under the Offenders Act. The Court cannot sentence a person who is less than 21 years of age to imprisonment under the Offenders Act as is clear from Section 6. If the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so. Section 360 of the Code, on the other hand, does not per se, make it obligatory on the Court to release a person under 21 years of age. The assistance of the Probation Officer for supervising the probationers is available to the Court under the Probation of Offenders Act. The Probation Officers, amongst other things, have to make an endeavour to find suitable employment to the offenders placed under their supervision as is clear from Section 14 of the Offenders Act. Similar facility is not available to the Court u/s 360 of the Code.

22. The Offenders Act is undoubtedly an earlier Act as compared to the Code of 1973. Yet, having regard to the fact that it is a special Act and contains more beneficial incidents for the offenders, it is legitimate to hold that it would not have been in the contemplation of the Parliament, while enacting Section 360 in the Code of 1973, to replace the Offenders Act by the subsequent provisions contained in Section 360. The Legislature was aware of the existence of the Offenders Act. In case it had so intended, it would have given a clear expression to that intention. It has not done so. The reason is obvious.

23. The principle of implied repeal is also not attracted. A prior particular or special law is not presumed to be repealed by latter general enactment. As observed by the Supreme Court in the U.P. State Electricity Board v. Hari Shankar Jain, AIR 1979 Sc 65, (in paragraph 8 of the report):

"The reason for the rule that a general provision should yield to a specific provision is this : In passing a special Act, Parliament devotes its entire consideration to a particular subject. When a General Act is subsequently passed, it is logical to presume that the Parliament has not repealed or modified the former special Act unless it appears that the special Act again received consideration from Parliament.....In The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others, this Court observed (at page 1174):

The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions - one covering a large number of matters in general and another to only some of them, his intention is that these latter directions should prevail as regards these, while as regards all the rest the earlier direction should have effect".

24. In Bishnu Deo Shaw Vs. State of West Bengal, it has been ruled by the Supreme Court that Section 360 of the 1973 Code re-enacts, in substance, Section 562 of the 1898 Code. The dictum of the Supreme Court tends to strengthen the view that in Section 19 of the Offenders Act of 1958 one has to

read Section 360 of the Code of 1973, in place of Section 562 of the Code of 1898, as envisaged by Section 8(1) of the General Clauses Act, 1897. Consequently, Section 360 of the Code :of 1973 shall cease to apply to the State of Himachal Pradesh when the Probation of Offenders Act, 1958, was brought into force in the State.

25. Sub-section (10) of Section 360 does not indicate that the provisions of Section 360 were intended to override those of the Offenders Act. In fact, it contains an indication that the provisions of Probation of Offenders Act; 1958, were not to be affected by what is contained in Section 360 of the Code. They make explicit, what is otherwise implicit in the provisions of Section 360 of the Code, that where the provisions of the Probation of Offenders Act are in force, those of Section 360 of the Code will have no effect thereon.

26. A further indication is contained in Section 361 of the Code about the fact that the provisions of the Offenders Act were not intended to be supplanted or replaced by those of Section 360 of the Code. The provision that in a case where the Court could have dealt with an accused person u/s 360 or under the provisions of the Probation of Offenders Act, 1958, but has not done so, it shall record its reasons for not having done so, in Section 361, shows that the provisions of the Probation of Offenders Act, 1958, may still operate in certain areas irrespective of the existence of Section 360 in the Code.

27. The fact that the Code is applicable to the whole of India, except the State of Jammu & Kashmir and some areas mentioned in subsection (2) of Section 1, with effect from April 1, 1974, is not in doubt. Section 360 of the Code is thus applicable with effect from that date. The applicability of the provisions of Probation of Offenders Act, 1958, to those States, which may have enforced it, in spite of the enactment of Section 360 of the Code, is envisaged by Section 361 itself. The only way to reconcile the co-existence of Section 360 of the Code with the provisions of the Probation of Offenders Act is to hold that the latter provisions alone will apply to the areas in which they have been enforced, to the exclusion of Section 360, while the provisions of Section 360 of the Code will operate in areas in which the provisions of the Offenders Act have not been enforced.