

(1977) 05 OHC CK 0013
In the Orissa High Court
Case No : Criminal Revision No. 350 of 1976

The State

APPELLANT

Vs

Biren Naik

RESPONDENT

Date of Decision : 16-05-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(2), 304(2), 465
Penal Code, 1860 (IPC) — Section 307
Probation of Offenders Act, 1958 — Section 4, 4(1)

Citation : (1977) 43 CLT 701

Hon'ble Judges : P.K. Mohanti, J

Bench : Single Bench

Advocate : A. Rath, Addl. Standing, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

P.K. Mohanti, J.—In Sessions Trial No. 3/17-K of 1976 disposed of on 16th August, 1976 the learned Assistant Sessions Judge of Keonjhar while convicting the accused-opposite party u/s 307. Indian Penal Code released him on probation u/s 4(1) of the Probation of Offenders Act instead of sentencing him to any punishment. Under the provisions of Section 4 of the Probation of Offenders Act a person found guilty of an offence punishable with death or imprisonment for life cannot avail of the benefit of probation. Section 307, Indian Penal Code provides "imprisonment for life" as one of the alternative punishments if hurt is caused to any person. According to the findings of the learned Assistant Sessions Judge the opposite party caused six gun-shot injuries on P.W. 2 Kanhu Juanga including one grievous injury on his chest.

2. This criminal revision has been started by the Court suo motu. The opposite party was noticed to show cause why he may not be released from the bond and sentenced to imprisonment. Despite service of notice the opposite party did not enter appearance. He, however, sent a letter addressed to the Additional Assistant Registrar of this Court stating that the grounds on which he was

released on probation have been clearly mentioned by the trial Judge in his judgment and that he has got nothing to add. He has also requested this Court to engage an Advocate at the expense of the State Government to defend him in this proceeding. The Appointment of State Defence Counsel in Sessions Case Rules, 1974 framed by this Court in exercise of the powers under Sub-section (2) of Section 304 of the Code of Criminal Procedure, 1973 applies only to sessions trials. It has no application to appeal or revision against a conviction. Therefore no State Defence Counsel could be engaged for the opposite party.

3. As indicated earlier, the provisions of Section 4(1) of the Probation of Offenders Act make it clear that a person found guilty of an offence punishable "with death or imprisonment for life" cannot avail of the benefit of probation. The intention of the legislature obvious is not to release on probation persons convicted of serious offences. An offence for which death or imprisonment for life can be inflicted is a serious offence. The legislature has thus withheld the benefit of probation where a person is found guilty of an offence punishable with either death or imprisonment for life.

4. The words "death or imprisonment for life" occurring in Section 4(1) of the Probation of Offenders Act should be read disjunctively so as to mean offence punishable with death or punishable with imprisonment for life. In the case of AIR 1927 205 (Rangoon) , a Full Bench of the Rangoon High Court overruled its previous decision in Mohammed Eusoof and Anr. v. King Emperor AIR 1926 Ran 51, wherein the conjunctive interpretation had been accepted and held that the phrase "death or transportation for life" must be read disjunctively as if it ran "punishable with death or punishable with transportation for life." An offence for which death can be inflicted and an offence for which imprisonment for life can be inflicted are both offences "punishable with death or imprisonment for life" regardless of whether another punishment can or cannot be inflicted either in addition or in substitution. I am fortified in this view by a number of authorities, for instance, Public Prosecutor Vs. Pingali Mallikarjana Kota Paneswara Rao, , AIR 1934 131 (Lahore) , AIR 1928 920 (Lahore) , Emperor v. Mt. Janki and Anr. A.I.R 1932 Nag 130, State Vs. Sheo Shanker, and Sarkar Vs. Jalamsingh, .

5. In the instant case, the accused-opposite party has been convicted u/s 307, Indian Penal Code and since hurt has been caused, the case calls for a sentence of imprisonment being awarded against the accused. It appears that though the sessions trial was held under the new Code of Criminal Procedure, 1973, the requirements of Section 235(2) of that Code were not complied with. No opportunity was given to the accused, after recording his conviction, to produce material and make submissions in regard to the sentence to be imposed on him.

6. In the case of State Singh v. The State of Punjab AIR 1976 S.C. 2386, it was held that non-compliance with the requirement of Section 235(2) cannot be described as mere irregularity in the course of the trial curable u/s 465. It is much more serious. It amounts to by-passing an important stage of the trial and omitting it altogether so that the trial cannot be said to be that contemplated in

the Code. It is a different kind of trial conducted in a manner different from that prescribed by the Code. This deviation constitutes disobedience to an express provision of the Code as to the mode of trial and such a deviation cannot be regarded as a mere irregularity. It goes to the root of the matter. When no opportunity has been given to the accused to produce material and make submissions in regard to the sentence to be imposed on him, failure of justice must be regarded as implicit. The decision referred to above was followed in the case of Nirpal Singh and Others Vs. State of Haryana, .

In view of the principles laid down by the Supreme Court the case has to be remanded to the trial Court for passing an appropriate sentence after giving an opportunity to the accused of being heard only on the question of sentence in accordance with the provisions of Section 235(2), Code of Criminal Procedure.

7. I would, therefore, allow this criminal revision, set aside the order releasing the accused u/s 4(1) of the Probation of Offenders Act and remand the case to the trial Court for passing an appropriate sentence after giving the accused an opportunity of being heard only on the question of sentence in accordance with the provisions of Section 235(2), Code of Criminal Procedure. The accused be taken to custody forthwith and the bond executed by him u/s 4(1) of the Probation of Offenders Act be cancelled.

Ordered accordingly.