
(1977) 04 BOM CK 0016
In the Bombay High Court

The State of Maharashtra

APPELLANT

Vs

Bodya Ramji Patil

RESPONDENT

Date of Decision : 12-04-1977

Acts Referred:

Penal Code, 1860 (IPC) — Section 335
Probation of Offenders Act, 1958 — Section 4

Citation : (1978) CriLJ 411

Hon'ble Judges : Kambli, J; Dighe, J

Bench : Division Bench

Judgement

Kambli, J.—Respondent Bodya alias Vanwas son of Ramji Patil, aged about 20 years (at the time of occurrence), resident of Saygaon in Tahsil Umred of District Nagpur, has been convicted by 4th Extra Assistant Sessions Judge, Nagpur, of an offence u/s 335 of the Indian Penal Code. Instead of sentencing him to any punishment, the learned Judge released the respondent after executing a personal bond of Rs. 500 with one surety in the like amount for a period of one year for keeping peace and be of good behaviour u/s 4 of the Probation of Offenders Act, 1958.

2. Initially, the respondent was charge with an offence u/s 307, or in the alternative u/s 326 of. the I.P.C. As he happened to be acquitted of these offences, the State has preferred Criminal Appeal No. 249 of 1975 against the acquittal of the respondent of those offences. The State has also preferred Criminal Appeal No. 250 of 1975 challenging the order of the learned Extra Assistant Sessions Judge, Nagpur, by which he released the respondent on probation on his personal bond with one surety under the provisions of the Probation of Offenders Act, 1958, as stated above.

3. It is prayed in this appeal that the order of the learned Assistant Judge be set aside and sentence against the respondent may be enhanced suitably.

4. The respondent and Dama (P. W. 1) who is the victim of the incident are residents of village Sayagaon. P. W. 1 Dama, P. W. 2 Doma, and P. W. 3 Bhaurao

Raut under whom the respondent was serving at the material time are residents and cultivators of the village Sayagaon. The respondent was in service of Bhaurao Raut (P. W. 3) who was also known as Bhaurao Patil, since 7 to 8 months prior to the date of the incident which is 13-12-1972. On that day, P. W. 1 Dama, P. W. 2 Doma, the respondent in these appeals, and one Bhaurao Khati and one Vanwas Dodake had gone for bringing fuel from the jungle of Pulgaon in three bullock carts. Respondent had gone to bring fuel of his master P. W. 3 Bhaurao Patil, P. W. 2 Doma was bringing fuel for himself. After filling the bullock carts with the fuel, they were returning to the village at about 4 p. m. Respondent, P. W. 1 Dama and Bhaurao Khati were on the bullock cart of P. W. 3 Bhaurao Patil which was being driven by the respondent. These facts are not in dispute. It is the case of the prosecution that while the respondent, P. W. 1 Dama and others were so returning in their bullock carts, the respondent, Bhaurao Khati and P. W. 1 Dama were cutting jokes with each other and there was exchange of words between the respondent and P. W. 1 Dama. It is also the case of the prosecution, rather introduced at the trial, that the respondent was piercing iron nail (Tutari) to the bullocks and hence Dama (P. W. 1) was asking him not to pierce the iron nail to the bullocks. Over that there was exchange of words between him (Dama P. W. 1) and the respondent. The prosecution case further is that at about 4-30 p. m. the bullock carts came near the field of P. W. 3 Bhaurao Patil. At that time, respondent was driving the cart and Dama (P. W. 1) was sitting behind him Both were abusing each other. Bhaurao Patil (P. W. 3), therefore, asked Dama (P. W. 1) to get down from the cart and asked the respondent to drive the cart. Dama (P. W. 1) accordingly got down. The respondent also got down from the cart with Ubhari a wooden rod inserted in the bill lack cart to prevent the things or articles stored in the cart from falling down. After Dama (P. W. 1) and respondent got down, there was a scuffle between them. P. W. 2 Doma, P. W. 3 Bhaurao Patil and one Van was Dodake separated them. After they were so separated, respondent P. W. 1 Dama, P. W. 2 Doma and P. W. 3 Bhaurao Patil and Vanwas Dodake were going by the way towards the village. While they were so going suddenly the respondent Bodya gave a blow of Ubhari on the head of Dama as a result of which injury was caused to Dama on the left side of the skull. There was profuse bleeding from the head injury of Dama. Dama became unconscious immediately. After assaulting Dama, the respondent had already run away from the spot leaving Ubhari on the spot. Dama was brought to the village as his condition was serious. Doctor was brought from village Nand and on his advice Dama was removed to Medical College Hospital, Nagpur. P. W. 2 Doma gave a report (Exh. 7) in the meanwhile to the police station Bhiwapur to P.S.I. Petkar (P. W. 11) -who registered the offence u/s 323 of the Indian Penal Code. Dama was treated in the Medical College Hospital, Nagpur. P.S.I. Petkar started investigation and it was revealed that injury sustained by P. W. 1 Dama was so grievous that it was likely to cause his death in the ordinary course of nature. Hence the registration of the offence was changed from Section 325, I.P.C. to Section 307 of the I.P.C. Dama was in the hospital from 14-12-1972 to 7-1-1973. P.S.I. Petkar recorded the statements

of the witnesses during the course of the investigation. He had also gone to the spot and recorded spot panchanama (Exh. 17). He had also seized the Ubhari (Article 7) and the clothes alleged to be of P W. 1 Dama and also other alleged Incriminating articles. As Dama was not in a position to make statement, his statement could not be recorded till 3-1-1973. After his statement was recorded and after the reports of the doctor and Chemical Analyser, Nag.pur, were received a charge-sheet was put up on 25-6-1973 in the Court of Judicial Magistrate, First Class, Umrer, who committed the case to the Court of Sessions Judge, Nagpur, in due course for an offence u/s 307 of the I.P.C.

5. Charge under S 307 of the Indian Penal Code or in the alternative u/s 326 of the I.P.C. was framed against the respondent. He pleaded not guilty to the charges. The respondent did not dispute that on the date of incident he had gone to the jungle of Pulgaon for bringing fuel for his master P. W. 3 Bhaurao Patil along with P. W. 1 Dama and his father P. W. 2 Doma with the bullock carts. The defence of the respondent was that while they were returning P. W. 1 Dama and Bhaurao Khati were teasing him (the respondent). They were also beating him. They were also pulling his hair. The further defence as appears from the suggestions made to the prosecution witnesses in their cross-examination on behalf of the respondent was that because of the harassment meted out to him by P. W. 1 Dama and Bhaurao Khati he started weeping. He got down from the bullock cart. According to the respondent, P.W. 1 Dama also tried to jump from the bullock cart for chasing the respondent and while he was so jumping from the bullock cart his leg was obstructed by the wood and he (Dama P. W. 1) fell on the stone. The respondent did not examine himself in his defence but examined one witness D.W. 1 Sitaram Zodape.

6. Relying upon the medical evidence in the case, the learned Assistant Sessions Judge held that Dama (P. W. 1) had sustained grievous hurt. He negated the defence of the respondent that Dama, while jumping from the cart fell down and sustained injuries on his head. He held that the grievous hurt sustained by P. W. 1 Dama was caused by the respondent. The learned Judge, however, held that the ingredients of the offence u/s 307 of the Indian Penal Code were not satisfied. Even though he held that the respondent had caused grievous hurt to P. W. 1 Dama, the learned Judge was of the view that the respondent gave a blow of Ubhari to P. W. 1 Dama, because of grave and sudden provocation given by Dama (P. W. 1). Hence he held that the offence committed by the respondent was one u/s 335 of the Indian Penal Code and not under S 325 or 326 of the I.P.C. As stated above, the learned Judge, instead of sentencing the respondent to any punishment, released him after executing a personal bond u/s 4 of the Probation of Offenders" Act. Being aggrieved, the State has preferred the two appeals.

7. It is submitted by Mr. Naik, on behalf of the State, that the respondent should have been held guilty for an offence u/s 325 of the Indian Penal Code. Rightly, he did not press for the conviction of the respondent u/s 307 of the I.P.C. He

submitted that the learned Judge was in error in holding that the respondent had given a blow of Ubhari under grave and sudden provocation. Offence, therefore, which should have been held proved as against the respondent was one u/s 325 of the Indian Penal Code. As regards the sentence, he submitted that the learned Judge committed an illegality in not calling for the report of the Probation Officer and still giving the respondent the benefit of Section 4 (1) of the Probation of Offenders" Act, 1958. Even otherwise he submitted that having regard to the circumstances of the case, the learned Judge did not exercise his discretion properly in giving him the benefit of Section 4 (1) of that Act.

8. The witnesses to the occurrence are P. W. 1 Dama, victim of the incident, his father P. W. 2 Doma and P. W. 3 Bhaurao Raut who is also known as Bhaurao Patil and under whom the respondent was serving at the material time. Doma (P. W. 1) deposed to the prosecution case as stated above. His evidence shows that he, the respondent and Bhaurao Khati were in the same bullock-cart while returning from Polgaon. That Dama (P. W. 1) and respondent were in the same cart has not been disputed before us. His evidence further shows that after the cart sometime left Polgaon, Ubhari of one cart had fallen down and, therefore, Bhaurao got down to pick it up and began to go on foot. The respondent was driving the cart. He (Doma P. W. 1) was on the bullock-cart. They came near the field of Bhaurao Patil (P. W. 3) at or about that time, the respondent was piercing iron nail (Tutari) to the bullocks and hence he (Dama P. W. 1) was asking him not to pierce the iron nail to the bullocks. There was exchange of words between him and the respondent over this. Bhaurao Patil asked him (Dama) to get down from the cart. Accordingly, he got down from the cart. The respondent also jumped down with Ubhari as soon as he (Dama) got down. The respondent caught him by the waist. Doma, Bhaurao Patil" and Vanwas Dodake intervened and released him. Then they were going on foot. While they were so going, the respondent gave a blow of Ubhari on the left side of his head. He (Dama) fell down and became unconscious. He did not know what had happened thereafter. Four days thereafter he regained consciousness in the Medical College Hospital. This incident, according to Dama, had occurred on the way about half a mile from his village Saygaon. In his cross-examination Dama denied the suggestion that since one mile before the place of incident, he and Bhaurao Khati were teasing and cutting jokes and pulling the hair of the respondent and that respondent was therefore weeping. He further denied the suggestion that because of the harassment, the respondent jumped down from the bullock-cart to be free from their trouble. He also denied the suggestion that after the respondent jumped down from the bullock-cart he (Dama) also jumped from the bullock-cart for chasing the respondent. It was also denied by him that while he was so jumping down, he fell down on a stone and thereby sustained injuries to the head.

9. The testimony of Dama has been materially corroborated by the testimony of his father Doma (P. W. 2) and also the testimony of Bhaurao Patil (P. W. 3). The evidence of Dama and these two witnesses shows that the respondent gave a blow of Ubhari on the head of Dama resulting in a profusely bleeding injury on

the head of Dama.

10. Before we advert to the defence of the respondent, it would be convenient to refer to the medical evidence on the record. Dr. Qureshi (P. W. 5) who is " a lecturer in Forensic Government Medical College Hospital, Nagpur, examined Dama at 11.40 a.m. on 14-12-1972 and he found the following injury:-

Abrasion of left skull (on left scalp) I "X" area, with extensive haematoma left parietal region and crepitations, the swelling extending on left face and temporal region; clinically fracture of skull bone.

The doctor advised an X-ray report. According to the doctor, the injury was caused by hard and blunt object and was about 12 hours old at the time of his examination. The injury according to the Doctor was a dangerous injury. He issued injury certificate as per Exh, 23. He opined that" the injury could be caused by Ubhari. Dr. Ravindranath Das (P. W. 10) who was Reader in Surgery in Medical College, Nagpur, also stated that Dama was admitted in the hospital on 14-12-1972 and he was discharged on 7-1-1973. He produced bed-head-ticket (Exh. 38). He stated that on the date of admission, the patient was unconscious; on the second day he (the patient Dama) was responding to the questions. In cross-examination he stated that if a person falls from a height of 10 to 15 feet on the head, he will have some other injuries i.e. injury to the cervical spine and to other parts of the body. He stated that the injury on the person of Dama was likely by fall, but it will be associated with other injuries as stated by him. The injuries which would be associated with such injuries would according to the Doctor not be bleeding. In case of a fall, there may or there may not be a fracture. Dr. Qureshi (P. W. 5) in his cross-examination stated that such an injury could not be caused by a fall on head, on surface of the ground or stone. According to him, in cases of fall, the left parietal region is unlikely to be injured as it does not come in contact, with the object. He stated that by a throw of a big stone such injury is likely to be caused. He was of the opinion that by any sort of fall such injury was unlikely. Now, this medical evidence negatives the case of the respondent that Dama, while jumping from the cart fell down on a stone and thereby sustained injuries to his head. The evidence of Dama (P. W. 1) and two witnesses namely Dama and Bhaurao Patil thus stands corroborated by the medical evidence on the record and shows that Dama must have sustained injuries as a result of the blow given by the respondent. Having regard to this material on the record, the evidence of the eye-witnesses and the medical evidence, the finding of the learned Assistant Sessions Judge that Dama sustained a grievous hurt as a result of blow given by the respondent appears to us to be correct.

11. The next question that arises for our consideration is what offence can be said to have been committed by the respondent. Mr. Naik for the State has rightly not pressed for the conviction of the respondent u/s 307 of the I.P.C. In order that Section 307 of the I.P.C. should attract in a particular case, it is necessary to establish that if the victim would have met his death, the offence -

would have been one u/s 302 of the I.P.C. Now, in this case, the medical evidence of Dr. Qureshi (P. W, 5) no doubt show that the injury was on the head and fracture of skull bone was caused. Still the question would be whether the offence would have been u/s 302 of the I.P.C. if the victim would have died. On that question, the evidence of Dr. Qureshi is material. Dr. Qureshi (P. W. 5) stated that the injury was styled by him as dangerous being situated on vital part and, therefore, the injury was labelled as dangerous and was likely to cause death. The doctor does not state that the injury was sufficient in the ordinary course of nature to cause death. That being the position the offence u/s 307 of the I.P.C. is ruled out. Mr. Naik has also not seriously pressed for the same. In the alternative, Mr. Naik presses conviction u/s 325 of the I.P.C. He strenuously challenges the order of conviction of the lesser offence u/s 325 of the I.P.C. The medical evidence of Dr. Qureshi (P. W. 5) shows that clinically fracture of skull bone was detected by him. He advised X-ray report. However, such a report is not available on the record. Still, there is no reason why the finding of the doctor to the effect that clinically fracture" of skull bone was detected should not be accepted. If there was a fracture obviously the offence would be one u/s 325 of the I.P.C. The learned Judge has also observed that the victim Dama was in the hospital for about 23 days. It appears that the learned Judge wants to suggest that that would also be a ground for holding the offence of grievous hurt proved. However, the circumstance that the victim was ill the hospital for 23 days would not, in our opinion, attract clause "eighthly" u/s 320 of the I.P.C. That clause requires that the hurt should cause the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits. There is no evidence to show that the victim was in severe bodily pain and there is no material on the record that the victim was unable to follow his ordinary pursuits during the space of twenty days. Some positive evidence on the point was necessary. However the medical evidence shows that there was a fracture and that would bring the offence u/s 325 of the I.P.C.

12. Initially, the respondent was charged u/s 326 of the I.P.C. The (prosecution case was that the respondent caused injury by an Ubhari which is a wooden rod. It appears that the length of Ubhari was 3 feet and 3 inches, and its diameter was 6 inches. In order that the offence should fall u/s 326 of the I.P.C, it is necessary to show that the weapon used as a weapon of offence was likely to cause death. There is no such material on the record brought by the prosecution to show that the weapon namely, the Ubhari used by the victim answered this description. The offence u/s 326 of the I.P.C. also, therefore, is ruled out .and Mr. Naik for the State has not seriously pressed for the conviction of the respondent under that section.

13. The question then remains for our consideration is whether the conviction of the respondent for a lesser offence u/s 335 of the I.P.C. is justified. That section provides;

S. 335. Whoever voluntarily causes, grievous hurt on grave and sudden

provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

For the applicability of this section, it is necessary that the grievous hurt should be caused on grave and sudden provocation. There is ample material on the record to show that the respondent must have been subjected to provocation. However, the question is whether the provocation to which he was subjected could be called as grave and sudden. The case of the prosecution in this behalf was that when Dama (P. W, 1) and respondent were coming in the bullock-cart, the respondent was piercing an iron nail (Tutari) to the bullocks and hence Dama was asking him not to pierce the iron nail to the bullocks and over that there was exchange of words between him and the respondent. To the same effect was the deposition of Doma (P. W: 2). However, both Dama and Doma had not stated before the police that respondent Bodya had pierced iron nail to the bullocks and that therefore there was exchange of words. The case of the prosecution therefore that the exchange of words was the result of the respondent's piercing the iron nail to the bullocks does not appear to be true. Now, Bhaurao Patil (P. W. 3) has stated in his deposition that before the incident, respondent and Dama were abusing each other in filthy language. If we refer to the evidence of the witness in vernacular it would appear that the abuses indulged in between them (Dama and respondent) were over the mother and sister. It was suggested to Dama (P. W. 1) that while respondent and Dama were returning from the bullock-cart, one mile before the place of the incident, Dama and Bhaurao Khati were teasing the respondent, were pulling his hair and cutting the jokes. This suggestion was denied by Dama. The same suggestion was put to Doma. Doma also denied the suggestion. However, he had to admit that he had stated before the police that since the time the respondent, Dama and Bhaurao Khati had started going from the jungle they were teasing and cutting jokes, with the respondent. The respondent had also examined one witness in this case by name Sitaram Madho Zodape (D. W. 1). He stated that at the material time, he was in his field. He then saw the respondent, Dama and Bhaurao Khati coming in a bullock-cart of Bhaurao Patil. The respondent Bodya was driving the cart. Dama and Bhaurao had caught the hair of accused Bodya. One of them gave a fist blow to the respondent Bodya. He (the witness) asked Dama not to do such thing on the cart of the fuel, still Dama did not pay any heed to what he said. Apart from the evidence of this witness, there is ample material on the record to show that there was exchange of words between the respondent and Dama and in that exchange of words they indulged in filthy abuses involving mother and sister also. This, in our view, was sufficient provocation; still as we have said earlier this could not be said to be a grave and sudden provocation. The burden is obviously on the accused respondent to show that there was grave and sudden provocation. The Supreme Court in K.M. Nanavati Vs. State of

Maharashtra, observed:-

The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control.

It appears from the material on the record that the respondent was at the material time acting as a servant of Bhaurao Patil (P. W. 3). Similarly, it appears that the appellant was some time working as a servant with others. Both of them come from rural area. We do not therefore think that in the absence of exact words being on record, the abuses commonly indulged in by the villagers like respondent and Dama, were sufficient to cause grave and sudden provocation. There is one more circumstance that also needs to be considered. It appears from the evidence that after the respondent and Dama got down from the cart there was scuffle between them. They were separated by Dama (P. W. 2), and Bhaurao Patil (P. W. 3) and one Vanwas Dodake. Thereafter they walked for a distance of about 50 yards and then all of a sudden the respondent gave a blow of Ubhari on the head of Dama. It is, therefore, highly doubtful whether the act of the respondent in giving a blow could be said to be the result of a sudden provocation. We are not satisfied from the material on the record that the respondent had discharged the burden of showing that he was subjected to grave and sudden provocation. No doubt the evidence on the record amply shows that the respondent must have been subjected to some provocation. However, we are not persuaded to hold that provocation was grave and sudden and, therefore, the conviction of the appellant for the lesser offence u/s 335 of the I.P.C. does not seem to us to be justified. The appeal, therefore, filed on behalf of the State being Criminal Appeal No. 249 of 1975 against the acquittal of the respondent for an offence u/s 335 of the I.P.C. will have to be allowed and the conviction of the respondent will have to be recorded u/s 325 of the I.P.C.

14. Now, coming to the appeal filed by the State for enhancement of the sentence being Criminal Appeal No. 250 of 1975, Mr. Naik for the State has strenuously contended that the learned Judge was in error in releasing the respondent on probation of good conduct without calling a report from the Probation Officer. According to him, the order of the learned Judge releasing the accused on probation is illegal as it contravenes, the mandatory provisions of Section 4 (2) of the Probation of Offenders' Act, 1958. We think that in view of the special circumstances of the case, we need not decide this question, whether the provisions of Section 4 (2) of the Probation of Offenders' Act are mandatory and require the Court to call for a report of the Probation Officer before passing an order for release of the offender on probation of good conduct. In the first place, the respondent was called upon to execute a bond with one surety for a period of one year for keeping peace and be of a good behaviour. He has executed that bond and it is not in dispute that the period of one year covered by the bond is already over. The respondent was by the impugned order of the learned Judge subjected to an obligation of keeping peace and be of good

behaviour and it is not shown that he has not carried out that obligation. Another circumstance that requires to be noticed is that the respondent is facing the trial right from 1972. It also appears that in the course of the investigation and during the pendency of this trial the accused-respondent has been in jail for at least 50 days. It may also be noted that u/s 360 of the new Cr.PC 1973, when a person is convicted of certain offences, if it appears to the Court before which he is convicted, regard being had to the age, character and 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 at any punishment, direct that he be released on his entering into a bond. Sub-section (4) of Section 360, Cr.PC provides that 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. Having regard to this provision, we sitting in appeal could have made an order u/s 360 of the Cr.PC without calling any report from the Probation Officer. Section 360, Cr. R C. does not require that there should be a report from the Probation Officer. In view of these circumstances obtaining in this case, we do not think that it would be in the interest of justice that a sentence of imprisonment should be passed against the respondent. Having regard to the circumstances under which the offence happened to be committed and having regard to the circumstances to which we have just referred we do not think it expedient to sentence the respondent to a term of imprisonment, or to fine. Dama (P. W. 1) stated in his cross-examination that there was no previous quarrel or dispute between him and the respondent. It appears that the respondent who is a young boy was subjected to provocation as he was teased by Dama and it further appears that in the heat of passion and without any premeditation the respondent happened to assault Dama with the Ubhari which was in his hand. It is thus apparent that there was no any premeditation or any previous design. As a result of teasing caused by Dama and Bhaurao Khati and as a result of the abuses given to him, the respondent happened to lose the control of his mind and in the heat of passion happened to give a blow on the head of Dama. He gave only one blow and ran away. It is not shown that the respondent is not a first offender. The offence which we have held proved is one u/s 325 of the Indian Penal Code, punishable with imprisonment for seven years. The provisions of Section 360 (1) of the Cr.PC would squarely be applicable to the facts of this case, and it would be open to us to release him on probation of good conduct, without calling for a report from the Probation Officer, in view of the circumstances, therefore, detailed above, we do not think that this is a fit case for enhancement of the sentence and in that view no interference, in our opinion, is called in the order passed by the learned Judge releasing the accused on probation of good conduct. The appeal filed by the State for enhancement of the sentence, in our opinion, will have to be dismissed.

15. Mr. Naik, the learned counsel for the State, has argued rather strenuously that the order passed by the learned Judge releasing the accused on probation of

good conduct is illegal feeing in contravention of the mandatory provisions of Section 4 (2) of the Probation of Offenders" Act (hereinafter referred to as the Act). According to Mr. Naik, it was obligatory upon the learned Judge to have called for the report of the Probation Officer before releasing the accused on probation of good conduct. As pointed out earlier, we could have, in this appeal, dealt with the respondent under the provisions in Section 360 (1) of the Cr.PC, 1973, and in that case, it was not necessary for us to decide the point raised -by Mr. Naik. However, as the point was argued at length by Mr. Naik it would be proper to make observations about the validity of the submission made by Mr. Naik. Mr. Naik placed reliance upon two decisions of the Supreme Court and certain decisions of other High Courts. The learned counsel for the respondent supported the order of the learned Judge. However, he did not show us any authority in support of his submission that it is not obligatory on the Court to call for a report of the Probation Officer u/s 4 (2) of the Act. He, however, placed reliance upon the observations of the learned author in a book "Probation of Offenders" Act and Rules" by S. C. Counsel, 11th Edition, where the learned counsel has expressed the opinion that it is not obligatory for the Court to call for such a report.

16. At the outset, we may point out that the two decisions of the Supreme Court relied upon by Mr. Naik do not decide the point in controversy. The case of Rattan Lal Vs. State of Punjab, was concerned with Section 6 of the Act and it was not a case where the question with which we are concerned arose for consideration.

17. In the case of Ram Singh v. State of Haryana, 1972 SCC 162 the two appellants accused were convicted u/s 326 read with Section 34 of the I.P.C. and they were sentenced to four years rigorous imprisonment and a fine. Their conviction and sentence was confirmed by the High Court. Before the Supreme Court, the learned counsel for the appellants invoked the application of Probation of Offenders" Act. While refusing to entertain the plea, the Supreme Court observed:

Sections 4 and 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. This plea cannot be entertained in this Court.

It is obvious that this case also did not deal with the point with which we are concerned in the instant case. We shall deal with the decisions of other High Courts pointed out to us a little later.

18. In order to appreciate the submissions made by Mr. Naik, it would be proper to refer to the relevant provisions of the Act. The preamble of the Act shows that it is an Act to provide for the release of offenders on probation or after due admonition and for matters connected therewith. Section 2 of the Act defines

certain expressions. Probation Officer is defined as meaning, an officer appointed to be a probation officer or recognised as such u/s 13. Section 3 deals with the power of Court to release certain offenders after admonition. The offences contemplated by this section are certain petty offences, with offenders having no previous conviction. Then come important sections, namely, Sections 4 and 6 of the Act. Sub-sections (1) and (2) of Section 4 of the Act are material for our purpose. They read as follows:-

4. (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.

Section 6 imposes restrictions on the sentence of imprisonment of offenders under twenty-one years of age. That section provides,

6. (1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him u/s 3 or Section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal u/s 3 or Section 4 with an offender referred to in Sub-section (1) the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental conditions of the offender." Section 14 deals with duties of Probation Officers. One of the duties is to enquire in accordance with any directions of a

court, into the circumstances or home surroundings of any person accused of an offence with a view to assist the court in determining the most suitable method of dealing with him and submit reports to the court.

19. From a few relevant provisions of the Act set out -above, it will appear that Sub-section (2) of Section 6 of the Act makes it obligatory for the Court not to sentence an offender to imprisonment when he is under twenty-one years of age and has committed an offence punishable with imprisonment but not with imprisonment for life, unless it is satisfied having regard to the circumstances of the case including the nature of the offence and the character of the offender, that it would not be desirable to deal with him u/s 3 or Section 4, and if the Court passes any sentence of imprisonment on the offender it shall record its reasons for doing so. In consonance with the object of the section, Sub-section (2) of Section 6 makes it obligatory on the Court to call for a report from the probation officer and consider the report, if any. If we turn to phraseology used in Sub-section (2) of Section 4 of the Act, it would appear that the Legislature did not use the expression, "The Court shall call for a report from the probation officer", All that the Sub-section says is that 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. It is obvious that there is a difference in the phraseology used in the two sections. If the Legislature would have intended to make it obligatory- on the Court to call for a report from the probation officer even u/s 4 of the Act, it is reasonable to presume that the Legislature would have employed the same phraseology in Sub-section (2) of Section 4 of the Act. We are, therefore, inclined to take a view that the Legislature did not intend to make it incumbent on the Court to call for a report from a probation officer before an order contemplated by Section 4 (1) of the Act is passed. The scheme of two sections, namely, Sections 4 and 6 of the Act is different. Section 6 deals with a person under twenty-one years of age and imposes a duty upon the Court not to impose a sentence of imprisonment for the offences mentioned in that section unless the Court is satisfied having regard to the circumstances enumerated in the section that it would not be desirable to deal with the offender u/s 3 or Section 4 of the Act. In consonance with the object of that section, the section makes it incumbent upon the Court to call for a report of a probation officer for the purpose of satisfying itself whether it would not be desirable to deal with the offender u/s 3 or Section 4 of the Act. As against this, Section 4 of the Act does not impose any restriction on the power of the Court in the matter of punishment but confers a discretion on the Court when any person under or above-twenty-one years of the age is found, guilty of the offences mentioned in that section to release him on probation of good conduct having regard to the circumstances enumerated in that section, namely, (i) the circumstances of the case, (ii) the nature of the offence and (iii) the character of the offender. It may be that in a particular case, there may be adequate material on record pointing out to the existence of the circumstances mentioned in Section 4 of the Act and in such a case the Legislature, it is reasonable to

presume, did not intend to make it obligatory upon the Court to call for a report from the probation officer before it passes an order u/s 4 of the Act. In this connection, we may usefully refer to a case of the Supreme Court in Mohamed Aziz Mohamed Nasir Vs. State of Maharashtra, In spite of the fact that Sub-section (2) of Section 6 mandatorily requires the calling for a report from the Probation Officer, the Supreme Court, without there being any such report before them thought it proper and expedient to give the benefit of the section to the appellant before them, having regard to the fact that there was sufficient material before them justifying the giving of such benefit to the appellant the Supreme Court observed;-

It is true that Sub-section (2) of Section 6 requires that for the purpose of satisfying itself whether it would not be desirable to deal with the appellant u/s 3 or Section 4, the Court is required to call for a report from the Probation Officer and consider the report, if any, but we do not think it necessary in the present case to call for any report from the Probation Officer nor to remand the case to the learned Presidency Magistrate for passing an appropriate order after calling for a report from the Probation Officer and considering it. We have on record the antecedent history giving the background of the appellant. The appellant was .at one time a well-known child film actor and -actually won several awards for acting in films. It appears that at some subsequent stage he fell in bad company and took to evil ways. The offence of which he is convicted is, no doubt, an offence of theft which cannot be lightly ignored, tout it is comparatively of a minor character in that only two sarees were snatched away from the hands of Govind, perhaps under the stress of economic necessity. Moreover, this is a first offence of the appellant. We are, therefore, not. at all satisfied that it would not be desirable to deal with the appellant u/s 3 or Section 4 and consequently, the sentence of imprisonment passed on the appellant must be set aside.

It will appear from the above observations of the Supreme Court that as there was sufficient material on the record to justify the giving of the "benefit of Section 6 of the Act to the appellant, the Supreme Court did not think it necessary to call for a report from the Probation Officer. This lends a support to our view that the Legislature by not using the words, "shall call for a report from the Probation Officer". In Sub-section (2) of Section 4 of the Act did not intend that in a case where there is sufficient material on the record to enable the Court to exercise its discretion u/s 4 of the Act, the report of the Probation Officer must necessarily be called. As we have pointed out the Legislature wanted to enjoin that the juvenile offenders under twenty-one years of age should not be sentenced to imprisonment and if the Court thought that it would not be desirable to deal with them u/s 3 or u/s 4 of the Act, the Legislature further imposed a mandatory condition that in that "situation the Court shall call for a report from the Probation Officer. Section 4 of the Act does not deal with any such restriction or injunction. On the contrary- Section 4 confers the discretion on the Court and that discretion, it appears to .us, the Legislature did not intend to restrict, by making it mandatory on the part of a Court to call for a report

from the Probation Officer in a case where there is already adequate material on the record.

20. Mr. Naik relied upon the decisions of other High Courts reported in the *The State of Mysore Vs. Saib Gunda and Others*, and *Gouranga Charan Bhol Vs. State of Orissa and Others*, In all these cases, with respect, the difference in the phraseology employed in Sub-section (2) of Section 6 and Sub-section (2) of Section 4 of the Act has not been taken into consideration. In some of the above decisions, the emphasis has been laid on the expression in Sub-section (2) of Section 4 of the Act "the Court shall take into consideration the report, if any, of the probation officer" and it is observed that this makes it incumbent upon the court to call for a report from the probation officer. All that the words, "the Court shall take into consideration the report, if any, of the probation officer" indicate is that if the report is called for by the court and that report is received, the Court has to take that report into consideration. These words are not preceded by a clause "the court shall call for a report from the Probation Officer", as is found in Section 6 (2) of the Act. The absence of such a clause, in our view, shows that the Legislature did not intend to make it obligatory on the part of the Court to call for a report from the probation officer, though it made obligatory on the Court to consider the report, if any, received from the probation officer after it was called. Reliance has also been placed in some of the above decisions on the observations of the Supreme Court in para 16 in *Ram Singh v. State of Haryana*, 1972 SCC 162 As we have pointed out, all that the Supreme Court says there is that calling for a report from a Probation Officer is of primary importance before the Court can pass an order under the Probation of Offenders" Act. The point with which we are concerned in the instant case, namely, whether it is obligatory on the Court to call for a report from the Probation Officer, before passing an order u/s 4 (1) of the Act was not considered or was not required to be considered in the Supreme Court case. With respect, we are unable to agree with the observations in the decisions relied upon by Mr, Naik to the effect that Sub-section (2) of Section 4 of the Act makes it a condition precedent upon the Court to call for a report from the Probation Officer before passing an order of releasing the offender on probation of good conduct.

21. We may, however, hasten to that though we are inclined to think that calling of a report from a probation officer u/s 4 (1) of the Act is not a condition precedent for making an order u/s 4 (1) of the Act, it is very essential that such a report should ordinarily be called from a probation officer. The object of the Act is to attempt for the possible reformation of certain offenders, instead of inflicting on them the normal punishment for their offences and thereby to prevent the turning of the offenders and especially the youthful offenders, into criminals, by their association with hardened criminals of mature age within the walls of a iprison. However, while keeping this object in view, it must also be borne in mind that the exercise of the discretion given to the courts u/s 4 of the Act needs a considerable sense of responsibility and the courts should not be misled into the free use of the section by misplaced leniency and sympathy. The

public as well as the offenders must not be led to suppose that the offenders may commit crimes without any fear of punishment. The provisions of the Act relating to probation must be applied with discretion; for otherwise rather than preventing the turning of the offenders into criminals it may assist in the manufacture of criminals, for it may become known that first offences even in respect of rather serious lapses can be committed with impunity, by merely offering to execute a "bond for good behaviour. This would certainly be not in the interest of the offender as well as the society. Before making an order u/s 4 (1) of the Act, it is necessary for the Court to consider (i) the circumstances of the case, (ii) nature of the offence and (iii) the character of the offender. It will thus be seen that the circumstance that no previous conviction is proved against the offender would not by itself be a sufficient reason for inflicting no penalty upon him. Calling for a report from the probation officer is, therefore, absolutely necessary in the interest of the offender and the society, and the same should be considered by the Court before it releases the offender on probation of good conduct. Releasing the offender on probation, without proper enquiry, as regards the character and antecedents of the accused would be exposing the society to the risk of the offender repeating the unlawful act and to bring the whole scheme of the probation into discredit.

22. The probation officer is an important officer in the machinery for the implementation of the Act. The post is created to assist the courts in the matter of probation. There is, therefore, no reason why his services should not be availed of before the order for probation is passed. It is essential that his services should be utilised, for otherwise important material relevant to be considered will not be available to the Court at all. It is, therefore, very essential that the Courts should not, in order to hasten up the disposal of the cases, be inclined to dispense with the calling for a report and give the benefit of Section 4 to the offenders without there being sufficient material on record before them.

23. There is one more aspect of the matter also. Section 11 of the Act provides that where an order u/s 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. The order, therefore, passed u/s 4 of the Act is obviously appealable and if it is found by the appellate Court that such an order is passed without there being sufficient material on the record the same would be liable to be set aside. In that case, the order passed without (proper enquiry would be in some cases liable to be remanded and this would naturally involve waste of time, both of the trial Court as well as the appellate Court. We, therefore, feel it necessary to emphasise that calling for a report from the probation officer under Sub-section (2) of Section 4 of the Act though not mandatory is absolutely essential, save in exceptional cases where there is sufficient material on record justifying the use of discretion conferred by Section 4 of the Act.

24. One more contention raised by Mr. Naik was that the learned Judge erred in

not giving compensation to the complainant in this case as required by Section 5 of the Act. Obviously Section 5 confers a discretion on the Court to make an order directing the offender to pay the compensation. It does not appear from the record that any such submission was made before the Court for granting compensation to the complainant. If at all the victim had suffered any injury it is open to him to follow the other remedies provided by the law. We do not think that the contention raised on behalf of the State that the omission on the part of the lower Court in not giving compensation is an irregularity which requires to be remedied by us.

25. In the result, the appeal filed by the State being Criminal Appeal No. 249 of 1975 is allowed. The order of conviction passed against the respondent u/s 335 of the Indian Penal Code is altered and the respondent is convicted for an offence u/s 325 of the Indian Penal Code and the order passed by the trial Court releasing the respondent on probation of good conduct is maintained.

26. The appeal filed by the State being Criminal Appeal No. 250 of 1975 for enhancement of the sentence is dismissed.