

Court No. - 12**Case :-** CRIMINAL APPEAL No. - 2478 of 2007**Appellant :-** Suresh And 3 Ors.**Respondent :-** State of U.P.**Counsel for Appellant :-** Anurag Narain, Aniruddh Singh**Counsel for Respondent :-** Govt. Advocate**Hon'ble Saurabh Lavania, J.**

1. Case called out.
2. Heard Heard Shri Prashant Chaurasiya, Advocate holding brief of Shri Anurag Narain, learned counsel for the appellants and learned AGA for the State as well as perused the records.
3. Instant Criminal Appeal under Section 374 (2), Cr.P.C. has been moved on behalf of the appellants against the judgment and order 24.08.2007 passed by Additional Session Judge, Fast Track Court No. 4, Hardoi, in Session Trial No. 197 of 2006, arising out of Case Crime No. 17 of 2005, P.S. Pali, District Hardoi, convicting and sentencing the appellants under Sections 323/34 each for six months simple imprisonment and a fine of Rs. 100/- fine, under Section 324/34 IPC with one year simple imprisonment and a fine of Rs. 250/- and under Sections 325/34 for two years simple imprisonment and fine of Rs. 250/- each with default stipulation.
4. Brief facts of the case are to the effect that on 11.02.2005 at about 10:40 a.m. morning complainant/informant Chandraprakash informed at Station Pali that Suresh, Kamlesh, Mithilesh and Sunil alias Bhullu digged out a drain in front of his gate and on being opposed, they assaulted him with lathi and danda and when her sister-in-law Guddi W/o Ramakant came to rescue him and she was also assaulted and also hurled abuses and threatened them. On this information, NCR No. 19/2005, under Sections 323, 504, 506 IPC was lodged against Suresh, Kamlesh, Mithilesh and Sunil alias Bhullu.
5. The Investigating Officer, in terms of order of concerned Magistrate under Section 155(2) Cr.P.C., registered Case Crime No. 17 of 2005 and thereafter, submitted the charge sheet against the accused/appellants, under Sections 323, 324, 504, 506 IPC.

6. After submission of charge sheet, Magistrate took cognizance and the said case was committed to the Court of Session wherein it was registered as S. T. No. 197 of 2006 and charges were framed under Sections 323, 324, 504, 506 IPC against the appellants, to which they denied and claimed trial.

7. In order to substantiate its case, prosecution examined as many as ten witness in its support including informant (P.W.1) and Guddi (P.W.3).

8. That after closing of the evidence, statement of accused/appellants under Section 313 Cr.P.C. was recorded by the trial court explaining the entire evidence and circumstances, in which appellants denied prosecution story and the entire prosecution story was said to be wrong and concocted.

9. Thereafter, the learned trial court after hearing learned counsel for both the parties and appreciating the entire evidence oral as well as documentary, found the accused/appellants guilty and convicted him as above.

10. Feeling aggrieved and dissatisfied with the impugned judgment and order of conviction, the appellants have preferred the present appeal.

11. Learned counsel for the appellants submits that the accused-appellants have not been convicted previously for any offence and they are the first time offender. The learned counsel at the outset submits that he is not challenging the impugned judgment and order of conviction and is confining his submission in the appeal only with respect to the order of sentence.

12. Learned counsel for accused-appellants submits that in view of the aforesaid facts and circumstances, including the fact that the accused-appellants have not been convicted previously for any offence, the trial court ought to have invoked the provisions of The Probation of Offenders Act, 1958 (hereinafter referred to as 'Act, 1958').

13. The Trial Court did neither invoke the provisions of the Act, 1958 nor the provisions of Section 360 Cr.P.C. while sentencing the accused-appellants. The Trial Court has not given any special reason in the impugned judgment and order of conviction and sentence for not giving the benefit of provisions of Section 360 Cr.P.C. or the provisions of Act, 1958.

14. Learned counsel for the accused-appellants submits that to that extent, the impugned judgment and order suffers from serious illegality being violative of provisions of section 361 Cr.P.C. and, therefore, it cannot be sustained.

15. Section 361 of the Code is required to be applied with or without the beneficial provisions i.e. Section 360 of the Code or provisions of the Act, 1958. If the Court chooses not to apply either of these provisions, it is required to give special reasons for not applying the beneficial provision in case the accused offender otherwise is eligible for provisions of Section 360 of the Code or Section 3 or 4 of the Act, 1958.

16. The accused-appellants have statutory right for claiming the benefit of beneficial legislation i.e. the provisions of the Act, 1958 and the learned Trial Court was under a duty to consider the applicability of Section 360 Cr.P.C. or Sections 3 or 4 of the Act, 1958 as mandated under Section 361 Cr.P.C. If the provisions of Section 360 Cr.P.C. or provisions of the Act, 1958 were not applied, then the learned Trial Court should have recorded reasons for the same.

17. Learned counsel for the appellants submitted that the State of Uttar Pradesh has its own local law of probation i.e. Uttar Pradesh First Offenders Probation Act, 1938. He further submitted that the Probation of Offenders Act, 1958 (Central Act) is also applicable in the State of Uttar Pradesh as held by Hon'ble the Supreme Court in the case of ***Mohd. Hashim Vs. State of U.P.; (2017) 2 SCC 198***. Thus, learned counsel for the appellants submitted that it is upon the discretion of the Court to grant benefits in either of the Acts.

18. Learned counsel for the appellants further submitted that he does not want to press the appeal on merits. He has submitted that the incident took place 23 years ago and there is no further criminal antecedent of the appellants. The delay in trial deprives the right of the appellants of speedy trial and they may be given benefit of first offender and appellants may be extended the benefit of Probation of Offenders Act, 1958 (herein after referred as the Act of 1958). He further submitted that appellants is first

time offender and is not previously convicted in any case. He further submitted that it is the Court which may consider the benefit of Section 4 of the Act of 1958 to the accused-appellants.

19. Learned A.G.A. on the other hand opposed the appeal and has submitted that there is no material irregularity or illegality committed by the court below and keeping in view the evidence on record, accused-appellants have been rightly convicted.

20. Learned AGA appearing for the State does not dispute the fact that accused-appellants is the first time offender and was not previously convicted in any other case. He also submits that in view of the expressed provisions of Section 361 Cr.P.C., considering the facts and circumstances, nature of the offence, the character of the accused-appellants and particularly, the time period which has lapsed since the date of incident, the benefit of Section 4 of the Act, 1958 can be granted in this case.

21. Learned A.G.A. further states that the benefit of Section 4 of the Act of 1958 could be extended to the accused-appellants on certain stipulations as specified in Section 4 of the Act of 1958.

22. After considering the arguments advanced by the parties and after perusal of the material available on record, this court finds that except apart the merits of the case, so far as the prayer of learned counsel for the appellants for providing benefits of Section 4 of the Act of 1958 is concerned, it is essential to discuss the legal position and law propounded in this regard.

23. Sections 3 and 4 of the Probation of Offenders Act, 1958 are extracted hereunder:

"3. Power of court to release certain offenders after admonition.- *"Where any person is found guilty of having committed an offence punishable under Section 379 or Section 380 or Section 381 or Section 404 or Section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal code, or any other law, and no previous conviction is proved against him 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 so to do, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.

Explanation.-For the purposes of this Section, previous conviction against a person shall include any previous order made against him under this Section or Section 4.

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."

24. That Hon'ble Supreme Court in ***Ratan Lal vs State of Punjab, AIR 1965 SC 444***, while discussing the purpose and object of Probation of Offenders Act, 1958, has observed in para no. 4, as follows:-

"4. The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. Broadly stated the Act distinguishes offenders below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years, absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the condition laid down in the appropriate provision of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them 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 offenders, it is not desirable to deal with them under Ss. 3 and 4 of the Act."

25. Further, the Hon'ble Supreme Court in the case of ***Ved Prakash vs State of Haryana, (1981) 1 SCC 447 : AIR 1981 SC 643*** while discussing on the duty of Bench and Bar regarding compliance of Section 360 Code of Criminal Procedure read with Section 4 of Probation of Offenders Act, 1958 was pleased to observe as under:-

"The offence, for which conviction has been rendered, is one which will be attracted by S. 360 or at any rate the Probation of offenders Act, 1958. The materials before us are imperfect because the Trial Court has been perfunctory in discharging its sentencing functions. We must emphasise that sentencing an accused person is a sensitive exercise of discretion and not a routine or mechanical prescription acting on hunch. The Trial Court should have collected materials necessary to help award a just punishment in the circumstances. The social background and the personal factors of the crime-doer are very relevant although in practice Criminal Courts have hardly paid attention to the social milieu or the personal circumstances of the offender. Even if S. 360 Cr.P.C. is not attracted, it is the duty of the sentencing Court to be activist enough to collect such facts as have a bearing on punishment with a rehabilitating slant. The absence of such materials in the present case has left us with little assistance even from the counsel. Indeed members of the bar also do not pay sufficient attention to these legislative provisions which relate to dealing with an offender in such manner that he becomes a non-offender. We emphasise this because the legislation which relate to amelioration in punishment have been regarded as 'Minor Acts' and, therefore, of little consequence. This is a totally wrong approach and even if the Bar does not help, the Bench must fulfil the humanising mission of sentencing implicit in such enactments as the Probation of offenders Act."

26. That it is also noteworthy that this Court in the case of ***Subhash Chand vs State of U.P.; [2015 Law Suit (All) 1343***, has emphatically laid down the need to apply the law of probation and give benefit of the beneficial legislation to accused persons in appropriate cases. This court issued following directions to all trial courts and appellate courts:-

"It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellantse courts. The Registrar General of this Court is directed to circulate copy of this Judgment to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgment. The District Judges in

the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

27. Further the Hon'ble Apex Court in ***State of Maharashtra vs Jagmohan Singh Kuldip Singh Anand; (2004) 7 SCC 659*** has extended the benefit of Probation of Offenders Act, 1958 to the appellants, and observed as under:-

"The learned counsel appearing for the accused submitted that the accident is of the year 1990. The parties are educated and neighbors. The learned counsel, therefore, prayed that benefit of the Probation of Offenders Act, 1958 may be granted to the accused. The prayer made on behalf of the accused seems to be reasonable. The accident is more than ten years old. The dispute was between the neighbors over a trivial issue of claiming of drainage. The accident took place in a fit of anger. All the parties educated and also distantly related. The accident is not such as to direct the accused to undergo sentence of imprisonment. In our opinion, it is a fit case in which the accused should be released on probation by directing them to execute a bond of one year for good behaviour."

28. That coming to the point of desirability of extending the benefit of Probation Act to the accused/ appellants in ***Sitaram Paswan and Anr v. State of Bihar, AIR 2005 SC 3534***, Supreme Court held as under:-

"For exercising the power which is discretionary, the Court has to consider circumstances of the case, the nature of the offence and the character of the offender. While considering the nature of the offence, the Court must take a realistic view of the gravity of the offence, the impact which the offence had on the victim. The benefit available to the accused under Section 4 of the Probation of Offenders Act is subject to the limitation embodied in the provisions and the word "may" clearly indicates that the discretion vests with the Court whether to release the offender in exercise of the powers under Section 3 or 4 of the Probation of Offenders Act, having regard to the nature of the offence and the character of the offender and overall circumstances of the case. The powers under Section 4 of the Probation of Offenders Act vest with the Court when any person is found guilty of the offence committed, not punishable with death or imprisonment for life. This power can be exercised by the Courts while finding the

person guilty and if the Court thinks that having regard to the circumstances of the case, including the nature of the offence and the character of the offender, benefit should be extended to the accused, the power can be exercised by the Court even at the appellate or revisional stage and also by this Court while hearing appeal under Article 136 of the Constitution of India."

29. That it is also noteworthy that Hon'ble Apex Court in the case of ***Mohd. Hashim v. State of U.P and Ors., AIR 2017 SC page 660***, was pleased to observe as under:

"20-.....In Rattan Lal v. State of Punjab AIR 1965 SC 444. Subba Rao, J., speaking for the majority, opined thus:-

"The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. Broadly stated, the Act distinguishes offenders below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them 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 offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act."

30. That Section 4 of the Act of 1958 is applicable where a person is found guilty of committing an offence where punishment is neither life sentence nor death. The Court may release such an accused on probation of good conduct on his furnishing a bond as mentioned in the Section. The Court in applying the provisions of this Section is also required to consider the circumstances of the case, character of the offender and nature of the offence before exercising its discretion.

31. A perusal of the aforesaid provisions of the Act of 1958 thus clearly indicate that Section 4 of the Act of 1958 does not create any distinction between the category of offenders and the provision of the said Section can be made applicable in any case where the offender is found guilty for committing an offence which is not punishable with death or imprisonment for life. Incidentally certain exceptions have been indicated by the Hon'ble

Supreme Court as in the case of *Smt. Devki Versus State of Harayana; 1979 (3) SCC 760* where the Hon'ble Supreme Court has held that benefit of Section 4 of the Act of 1958 could not be extended to a culprit who was found guilty of abducting a teenaged girl and forcing her to sexual submission with criminal motive. Similarly in the case reported in *1980 (4) SCC 669 in Re: State of Maharashtra Versus Natwar Lal Damodar Das Soni*, the Hon'ble Supreme Court declined to extend the benefit of the Act of 1958 to an accused found guilty of gold smuggling.

32. The Hon'ble Apex Court in case of *Jagat Pal Singh & others vs. State of Haryana, AIR 2000 SC 3622* has given the benefit of probation while upholding the conviction of accused persons under Sections 323, 452, 506 IPC and has released the accused persons on executing a bond before the Magistrate for maintaining good behaviour and peace for the period of six months.

33. Similarly this Hon'ble Court in case of *Virendra Kumar Vs State of U.P.; 2022(120)ACrC 392* has given benefit of probation while upholding the conviction of revisionist under section 7/16 of Food Adulteration Act and had released the accused persons on executing a bond before Magistrate for maintaining good behaviour and peace for period of six months.

34. Recently in the judgment passed in the case of *Tarak Nath Keshari vs. State of West Bengal; 2023 SCC OnLine SC 605*, the Hon'ble Apex Court after considering the provisions of Essential Commodities Act, 1955 (in short "Act of 1955"), extended the benefit of the Act of 1958 to the accused. The relevant paragraphs of the judgment are as under:-

"10. However, still we find that a case is made out for grant of benefit of probation to the appellants for the reason that the offence was committed more than 37 years back and it was not pointed out at the time of hearing that the appellants was involved in any other offence. Before all the courts below, the appellants remained on bail. While entertaining his appeal, even this Court had granted him exemption from surrendering. Section 4 of the Probation of Offenders Act, 1958 has a non obstante clause. The same is extracted below:

"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-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under subsection (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under subsection (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

11. Even if there is minimum sentence provided in Section 7 of the EC Act, in our opinion, the appellants is entitled to the benefit of probation, the EC Act, being of the year 1955 and the Probation of Offenders Act, 1958 being later. Even if minimum sentence is provided in the EC Act, 1955 the same will not be a hurdle for invoking the applicability of provisions of the Probation of Offenders Act, 1958. Reference can be made to a judgment of this Court in *Lakhvir Singh v. The State of Punjab*; (2021) 2 SCC 763.

12. The appeal is accordingly disposed of. The appellants is directed to be released on probation under Section 4 of the Probation of Offenders Act, 1958 on entering into bond and two sureties each to ensure that he will maintain peace and good behaviour for the remaining part of his sentence, failing which he can be called upon to serve the sentence."

35. It would not be out of place to state here that the High Court of Judicature at Madras in the judgment dated 01.02.2022 passed in ***Crl.R.C.No. 939 of 2019 (Nitin vs. State Rep by its Inspector of Police, TIW (East) Police Station, Coimbatore)*** extended the benefit of the Act of 1958 to the accused, who was convicted for the offences as indicated under Sections- 279 and 304A IPC. The relevant portion of the judgment reads as under:-

"13. Section 3 of the Probation of Offenders Act, 1958 confers power upon the courts to release certain offenders after admonition. When a person is guilty of offence punishable for any offence with imprisonment for not more than two years or with fine or with both under the Penal Code 1860 or any other law and there is no previous conviction proved against such offender. The said legal provision is extracted hereunder for ready reference:-

"3. Power of court to release certain offenders after admonition. When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him 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 so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition."

14. When the court empowered to try and sentence the offender to imprisonment declines to deal with him under Section 3 of the Probation of Offenders Act, 1958, the Appellate Court or the revisional court, as the case may be, i.e., either the Sessions Court or the High Court is empowered under Section 11(1) of the Act to make an order under this Act. It is relevant to extract Section 11(1) of the Act, which reads as under:-

"11. Courts competent to make order under the Act, appeal and revision and powers of courts in appeal and revision.-

(1) Notwithstanding anything contained in the Code or any other law, an order under this Act, may be made by any court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court when the case comes before it on appeal or in revision."

15. It is relevant to note that the Hon-ble Apex Court, in several cases, has held that in case of motor accidents, rash and negligent driving should be taken serious note of and in number of cases, it has desisted from invoking the provisions of Probation of Offenders Act, 1958 However, in State vs. Sanjiv Bhalla (2015) 13 SCC 444, taking into consideration its earlier decisions, the Apex Court has held as under:-

"11. Every accused person need not be detained, arrested and imprisoned liberty is precious and must not be curtailed unless there are good reasons to do so. Similarly, everybody convicted of a heinous offence need not be hanged however shrill the cry off with his head and this cry is now being heard quite frequently. Life is more precious than liberty and must not be taken unless all other options are foreclosed. [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] Just sentencing is as much an aspect of justice as a fair trial and every sentencing Judge would do well to ask: Is the sentence being awarded fair and just?

12. In Ved Prakash v. State of Haryana [(1981) 1 SCC 447 : 1981 SCC (Cri) 182] this Court observed that: (SCC p. 448, para 1)

"1.... [I]t is the duty of the sentencing court to be activist enough to collect such facts as have a bearing on punishment with a rehabilitation slant."

A little later in the judgment, it was held that: (SCC p. 448, para 1)

"1. [E]ven if the Bar does not help, the Bench must fulfil the humanising mission of sentencing implicit in such enactments as the Probation of Offenders Act."

In other words, this Court was of the view that punishment should be rehabilitative and humanising and, therefore, need not necessarily be retributive in character.

13. Subsequently, in Hari Singh v. Sukhbir Singh [(1988) 4 SCC 551 : 1988 SCC (Cri) 984] this Court held that extending the benefit of probation to first-time offenders is generally not inappropriate. The humanising principle was extended even to a conviction under Part II of Section 304 IPC in State of Karnataka v. Muddappa [(1999) 5 SCC 732 : 1999 SCC (Cri) 1046] in which case the benefit of release on probation was granted to the convict.

14. The benefit of the provisions of Section 6 of the Probation of Offenders Act (relating to restrictions on the imprisonment of offenders below 21 years of age) [**"6.Restrictions on imprisonment of offenders under twenty-one years of age.-**
(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 under Section 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 under Section 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 other information available to it relating to the character and physical and mental conditions of the offender."] was extended to persons convicted of attempted rape. This was in *State of Haryana v. Prem Chand* [(1997) 7 SCC 756 : 1997 SCC (Cri) 1176] which was followed in *State of H.P. v. Dharam Pal* [(2004) 9 SCC 681 : 2004 SCC (Cri) 1477].

15. Similarly, in *Om Prakash v. State of Haryana* [(2001) 10 SCC 477 : 2003 SCC (Cri) 799] the convicts, first-time offenders, were given the benefit of Section 360 and Section 361 of the Criminal Procedure Code and it was held that reasons ought to have been recorded for the denial of such a benefit. [**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... (2)*** (3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Penal Code, 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)-(10) **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." The offence in that case was punishable under Section 323 and Section 325 read with Section 148 and Section 149 IPC.

16. In the meanwhile, however, in *Dalbir Singh v. State of Haryana* [(2000) 5 SCC 82 : 2004 SCC (Cri) 1208] this Court declined to give to the appellants, convicted of an offence punishable under Section 279 and Section 304~A IPC, the benefit of Section 4 of the Probation of Offenders Act [**"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-section (1), the court shall take into consideration the report, if any, of the Probation Officer concerned in relation to the case. (3)-(5)] keeping in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families". It was held that: (*Dalbir Singh case* [(2000) 5 SCC 82 : 2004 SCC (Cri) 1208] , SCC p. 87, para 13):-

"13. [C]riminal courts cannot treat the nature of the offence under Section 304~A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence."

That decision, in which a cyclist was killed, resulted in a sentence of three months and one year respectively for the violation of the two sections mentioned above. That decision, in a sense, was a precursor to a stricter application by this Court of the provisions for releasing a convict on probation and went contrary to the grain of earlier decisions of this Court.

17. In *Karamjit Singh v. State of Punjab* [(2009) 7 SCC 178 : (2009) 3 SCC (Cri) 330] the convict, a first-time offender, was denied the benefit of release on probation in view of the gravity of the offence and a large number of injuries on the victim. The conviction in that case was for an offence punishable under Section 307 IPC and Section 27 of the Arms Act. That decision contains an inadvertent error, to the following effect: (SCC p. 185, para 26)

"26. In *Manjappa v. State of Karnataka* [(2007) 6 SCC 231 : (2007) 3 SCC (Cri) 76] this Court considered the scope of grant of relief under the provisions of Section 361 CrPC or under the provisions of the Probation of Offenders Act, 1958 reconsidering earlier judgment of this Court in *Om Prakash v. State of Haryana* [(2001) 10 SCC 477 : 2003 SCC (Cri) 799] , and held that such a relief should be granted where the offence had not been of a very grave nature and in certain cases where mens rea remains absent as in a case of rash and negligent driving under Section 279 read with Section 304-A IPC."

18. As has been noticed above, *Om Prakash* [(2001) 10 SCC 477 : 2003 SCC (Cri) 799] related to an offence punishable under Section 323 and Section 325 read with Section 148 and Section 149 IPC. *Manjappa* [(2007) 6 SCC 231 : (2007) 3 SCC (Cri) 76] relates to the offences punishable under Sections 323, 325 and 504 IPC. There is no reference to any offence punishable under Section 279 or Section 304-A IPC. However, it appears that this Court desired to convey that an offence punishable under Section 279 and Section 304~A IPC is the result of an accident and is, therefore, not grave since there is an absence of mens rea.

19. Notwithstanding this, in *State of Punjab v. Balwinder Singh* [(2012) 2 SCC 182 : (2012) 1 SCC (Cri) 706] it was again held that the punishment for causing death by rash or negligent driving should be deterrent, in view of the frequency of such incidents. The accident in that case resulted in the death of five persons, and the punishment was six months- rigorous imprisonment with a fine of Rs 5000."

36. This Court also in the judgment dated 06.03.2020 passed in ***Criminal Appeal No. 2135 of 2008 (Rajjan vs. State of U.P.)*** granted the benefit to the accused, who was convicted for the offences as indicated under Sections- 147, 323/149, 325/149, 304(2)/149 IPC. The relevant portion of the judgment reads as under:-

"8. The Hon'ble Apex Court in the case of *State of Karnataka vs. Muddappa* [(1999) 5 SCC 732] had considered the question as to whether the benefit of Probation of Offenders Act could be extended to an offence under Section 304 Part-II of the IPC and concluded that there is no statutory bar for application of Probation of Offenders Act to an offence under Section 304 Part II, where the maximum punishment is neither death nor

imprisonment for life. The same view has been taken by the Hon'ble Supreme Court in the case of Mohd. Monir Alam vs. State of Bihar [(2010) 12 SCC 26], wherein their Lordships had given the benefit of Section 4 of Probation of Offenders Act to the appellants and directed the trial court to release the appellants under Section 4 of Probation of Offenders Act.

9. After hearing learned counsel for both the parties and going through the record, I find that the learned trial court has not given any special reasons as prescribed under Section 361 of Cr.P.C. as to why the benefit of Section 360 of Cr.P.C. and Section 4 of Probation of Offenders Act, has not been given to the appellants. It appears that all the appellants belong to the poor family and there is no criminal history against them.

10. Therefore, in view of the above discussion, I find that the sentencing order passed by learned trial court suffers from irregularity. It is admitted position between the parties that the appellants have been convicted under Section 304(II) I.P.C. read with Section 323 I.P.C. Maximum punishment under Section 304 (II) I.P.C. is ten years without fine and under Section 323 I.P.C. is one year without fine.

11. In these circumstances, I am of the opinion that provisions of Probation of Offenders Act, 1958 and Section 360 Cr.P.C. shall apply in the case and the appellants deserve to get the benefit of Section 4 of Probation of Offenders Act, 1958 and the purpose of justice will be served if the appellants would be sentenced to undergo imprisonment during which they were in custody for all the offences.

12. In view of the above facts and circumstances mentioned and also considering the scope of Section 4 of the Act, this appeal is, accordingly, dismissed by upholding the conviction of the accused-appellants. However, they are granted the benefit of Section 4 of the Act. The accused-appellants are released on probation. The accused-appellants shall file personal bonds to the tune of Rs.20,000/- and they shall keep peace in the society and shall not commit any such offence in future. These bonds shall be for one year. (a) In case of breach of any such condition, the accused-appellants will undergo the sentences passed by the Trial Court as per law. (b) The accused-appellants shall file the bonds within a period of one month from today."

37. That it is noteworthy that the incident took place way back in the year 2005. The accused-appellants have suffered in the matter for the past about nineteen years and there is no any criminal antecedent of them during these years, as informed.

38. Considering the above stated facts, relevant provisions of law and settled proposition on the issue and also the period lapsed from the date of incident i.e. about nineteen years and the statement of informant (P.W.1) and injured witness namely Guddi (P.W.3) and also the

punishment/sentence awarded for the offence under Section(s) 323/34 IPC and 325/34 IPC, as indicated above, I am of the view that benefit of provision of the Act of 1958 should be provided to the accused / appellants.

39. In the light of the above, as far as it relates with the conviction of the appellants namely **Suresh S/o Rameshwar, Mithilesh S/o Jai Jai Ram, Kamlesh S/o Jai Jai Ram and Sunil alias Bhullu** is maintained but the sentence is modified. Instead of sending the appellants to jail, they are given benefit of Section 4 of The Probation of Offenders Act, 1958 and are directed to file two sureties each to the tune of Rs 20,000/- along with personal bonds before District Probation Officer concerned and also an undertaking to the effect they shall maintain peace and good behaviour during the period of one year from today. The said bonds are to be filed by the appellants within a period of three months from the date of this judgment.

40. In case of breach of any of the above conditions, the appellants shall be taken into custody and shall have to undergo sentence awarded to them.

41. With the above modification, the instant appeal is **partly allowed**.

42. A certified copy of the order be also sent to the court concerned for compliance.

43. Office is directed to communicate this order to the court concerned for necessary compliance.

44. Trial court record, if any, shall also be sent back to the district court concerned.

Order Date :- 25.10.2024

Mohit Singh/-