A

# ARVIND MOHAN SINHA

v.

# AMULYA KUMAR BISWAS & ORS.

*January* 17, 1974

B [S. N. DWIVEDI AND Y. V. CHANDRACHUD, JJ.]

*Probation of offenders Act*, 20 *of* 1958—*Whether applies to offences under Customs Act*, 1962, *and offences under Part XII-A. Defence of India Rules*, 1962.

*Defence of India Rules*, 1962, *r.* 126 *I and* 126*P*—*'Gold' if includes smuggled gold.*

C On the question (1) whether the Probation of Offenders Act, 1958, applies to offences under Customs Act, 1962, and to those under Part XII-A of the Defence of India Rules, 1962, relating to Gold Control, and (2) whether under the scheme of the Gold Control Rules, smuggled gold is not comprehended under r. 126p.

HELD: (1) These are mostly economic offences which in conceivable cases, may pose a grave threat to the economy and the security of the country. They are fundamentally of a different genre and are calculated to involve consequences of a far reaching character as compared with the offences under the general law of crimes. But every contravention of the Customs Act or the Gold Control Rules cannot, without more, be assumed to be fraught with consequences of national D dimensions. The words of s. 4(1) of the Probation of Offenders Act are wide and would include even offences under the Customs Act and the Gold Control Rules. Though r.126p(2) (ii) of the Defence of India Rules prescribes a minimum sentence of 6 months, it cannot override the provisions of the Probation of Offenders Act. [136G]

(a) The Probation of Offenders Act is a reformative measure and its object is to reclaim amateur offenders who, if spared the indignity of incarceration, can E be usefully rehabilitated in society. A jail term would normally be enough to wipe out the stain of guilt but the sentence which society passes on convicts is relentless. In recalcitrant cases punishment has to be deterrent so that others similarly minded may warn themselves of the hazards of taking to a career of crime. But the novice, as in the present case, who strays into the path of crime ought, in the interest of society, to be treated as being socially sick. The ignominy commonly associated with a jail term and the social stigma which attaches to convicts often render the remedy worse than the disease. Crimes are not always rooted in criminal tendencies and their origin may lie in psychological factors induced by hunger, want and poverty. F The Act recognises the importance of environmental influence in the commission of crimes and prescribes a remedy whereby the offender can be reformed and rehabilitated in society. An attitude of social defiance and recklessness which comes to a convict who, after a jail term, is apt to think that he has nothing more to lose or fear, may breed a litter of crime. The object of the Act is to nip that attitude in the bud. [137A]

*Ratan lal* v. *State of Punjab*, [1964] 7 S.C.R. 676 and *Isher Das* v. *The State of Punjab*, A.I.R. 1972 S.C. 1295, followed.

G (b) There is no foundation for the fear that offenders released on probation may hold the society to ransom and that society may therefore look upon the release of offenders on probation as the triumph of criminals over the weaknesses of law. An offender released on probation is convicted but not forthwith sentenced in the sense of penal laws. Section 4(1) of the Act provides that instead of sentencing the offender "at once" the court may direct his release on his entering into a bond to receive a sentence when called upon during the probationary period and in the mean time to keep the peace and be of good behaviour. Thus it is only in a limited sense, H though a socially significant, sense, that the Act constitutes an exception to the broad and general principle of criminal law that a sentence shall follow on conviction. The discretion vested in the trial court in this behalf must of course be exercised according to rules of reason and justice depending on the circumstances of each case. but the Magistrate had called for the report of the Probation Officer and it was

on the basis of that report that the respondents were released on probation and the High Court has upheld the exercise of that discretion. There is no reason to interfere with the concurrent factual evaluation of the circumstances of the case. [137G] A

*Jai Narain* v. *The Municipal Corporation of Delhi*, A.I.R. 1972 S.C. 2607, referred to.

(2) The High Court erred in holding that the legislature could not have intended that a person in possession of smuggled gold should make a declaration in regard thereto. [140A]

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(a) Under r. 126I of the Gold Control Rules (of Defence of India Rules) every person must, within the stipulated period, make a declaration to the administrator as to the quantity, description and other prescribed particulars of gold owned by him. Failure or omission to do so, without reasonable cause, is made punishable by r. 126(1)(i). Possession of gold in contravention of any provision of Part XII-A is made punishable by Rule 126P(2)(ii). The definition of 'Gold' in r. 126A (d) is couched in wide terms and it does not make any distinction between smuggled gold and gold lawfully possessed. [140G]

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(b) The intention of the legislature must be gathered primarily and principally from the words used by it and the definition of 'gold' carves out no exception in favour of smuggled gold. It would be surprising that the obligation to declare gold should be imposed on lawful possessors of gold but should leave untouched the possession by smugglers or their agents of gold smuggled into the country. [140B]

(c) Under the definition Gold means gold and it should not be read as 'gold means gold but shall not include smuggled gold'. To put such a construction on the definition is to coin a new definition and therefore to legislate. [140C]

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(d) The word 'gold' is used at several places in the Gold Control Rules and it is a well recognised rule of construction that the same word should receive the same meaning in collocation. It is manifest from the language, intendment and scheme of these Rules that the word 'gold' covers not only gold which is lawfully possessed but gold in any form or shape and whether possessed lawfully or otherwise. [140D]

*K. Vishnumoorthi* v. *State of Mysore & Anr.*, 1971 (2) Mys. L. J. 261, approved.

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 114 & 115 of 1970

From the Judgment and Order dated the 28th November, 1969 of the Calcutta High Court in Criminal Revision Case Nos. 635 and 636 of 1969.

*S. N. Prasad* and *S. P. Nayar*, for the appellant.

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The respondents did not appear (in Cr. A. 114 & 115/70).

The Judgment of the Court was delivered by

CHANDRACHUD, J.—These appeals are brought by leave granted by the High Court of Calcutta under Article 134(1)(c) of the Constitution.

*Cr. A. No.* 114 *of* 1970: On May 29, 1968 gold bars and sovereigns bearing foreign markings were seized from the respondents by customs officers, Calcutta. Respondents were charged under section 135, Customs Act, 1962 for being in possession of goods which they had reason to believe to be liable to confiscation under section 111 of that Act. It was alleged that the goods were imported into India without the requisite permit and without payment of duty and were therefore liable to confiscation under section 111(d) of the Customs Act. The respondents were also charged under Rules 126P(1)(i) and 126P(2)(ii) of the Defence of India Rules, 1962, for failure to make a declaration in respect of the gold found in their possession.

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A The respondents pleaded guilty to the charges but cited facts in extenuation of the offences. The learned Presidency Magistrate, 8th Court, Calcutta, convicted them of the offences of which they were charged but he directed, on the faith of a report made by the Probation Officer, that they should be released under section 4(1) of the Probation of Offenders Act, 1958 on their executing a bond of Rs. 1000/- each with one surety in like amount, undertaking to appear and receive the B sentence whenever called upon and to keep peace and be of good behaviour for a period of two years. Respondents are young boys normally engaged in agriculture. To us they seem to be carriers who were carrying the gold for a small tip but the learned Magistrate believed their defence that they had purchased the gold for the marriage of the sister of one of them. The gold which was of the value of about Rs. 7800/- was already confiscated in the proceedings under the Customs Act.

C

The appellant, an Assistant Collector of Customs, filed on behalf of the Department a revision application (No. 635 of 1969) in the High Court of Calcutta against the judgment of the learned Magistrate. Later, it was converted into an appeal under section 11(2) of the Probation of Offenders Act.

I The High Court disposed of three matters by a common judgment which is reported in *Aravinda Mohan Sinha* v. *Prohlad Chandra Samanta*[1] Two out of these are before us; the third, Criminal Appeal No. 113 of 1970 is reported to be unready. The High Court held in the matter under consideration that though Rule 126PP(2)(ii) of the Defence of India Rules prescribes a minimum sentence of imprisonment for a term of not less than 6 months", it cannot override the provisions of F the Probation of Offenders Act and therefore it was competent to the learned Magistrate to release the respondents under that Act.

The only question in this appeal is whether the Probation of Offenders Act, 20 of 1958, can apply to offences under the Customs Act, 1962 and to those under Part-XII-A of the Defence of India Rules, 1962, intituled "Gold Control".

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Section 135(b)(ii) of the Customs Act, 1962, under which the respondents have been convicted prescribes a punishment of 2 years imprisonment or fine or both for acquiring possession of or for being in any way concerned in carrying, keeping etc. any goods which a person knows or has reason to believe to be liable to confiscation under section 111. Under section 111(d), goods imported contrary to any G prohibition imposed by or under the Customs Act or by any other law are liable to confiscation. The offence comitted by the respondents consists in their being in possession of or in purchasing the gold bearing foreign markings which was evidently imported into India without a valid permit issued by the Reserve Bank of India, an act prohibited by section 8(I) of the Foreign Exchange Regulation Act, 1947. On the prosecution leading evidence to establish the ingredients of this offence, H respondents pleaded guilty to the charge.

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(1) A. I. R. 1970 Cal. 437.

Rule 126P(1)(i) of the Defence of India Rules, 1962 provides to the extent material that whoever omits or fails to make a declaration as required by Rule 126 I without a reasonable cause shall be punishable with imprisonment for a term which may extend to one year or a fine or with both. The relevant part of Rule 126 I provides that every person shall within the specified period make a declaration to the Administrator in the prescribed form as to the quantity of gold, other than ornaments owned by him. Rule 126P (2)(ii) provides that whoever has in his possession or under his control any quantity of gold in contravention of the provisions of Part XII-A ("Gold Control"), shall be punishable with imprisonment for a term of not less than 6 months and not more than 2 years and also with fine. Respondents had made no declaration of the gold in their possession and pleaded no reasonable cause for omitting to do so. They pleaded guilty to these charges as well.

The Probation of Offenders Act, 1958, received the assent of the President on May 16, 1958 and was published in the Gazette of India on May 19, 1958. Section 3 of the Act confers power on the court to release certain offenders after admonition. Under section 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."

We are unable to accept the appellant's contention that the probation of Offenders Act can have no application to offences consisting of the contravantion of the Customs Act or the "Gold Control" Rules contained in Part XII-A of the Defence of India Rules, 1962. True, that these offences are fundamentally of a different genre and are calculated to involve consequences of a far-reaching character as compared with offences under the general law of Crimes. These are mostly economic offences which in conceivable cases may pose a grave threat to the economy and the security of the country. But every contravention of the Customs Act or the "Gold Control" Rules cannot, without more, be assumed to be fraught with consequences of national dimensions. The broad principle that punishment must be proportioned to the offence is or ought to be of universal application save where the statute bars the exercise of judicial discretion either in awarding punishment or in releasing an offender on probation in lieu of sentencing him forthwith. The words of section 4(1) of the Probation of offenders Act are wide and would evidently include offences under the customs Act and the Gold Control Rules.

A The Probation of Offenders Act is a reformative measure and its object is to reclaim amateur offenders who, if spared the indignity of incarcaration, can be usefully rehabilitated in society. A jail term should normally be enough to wipe out the stain of guilt but the sentence which the society passes on convicts is relentless. The ignominy commonly associated with a jail term and the social stigma which attaches to convicts often render the remedy worse than the disease and the B very purpose of punishment stands in the danger of being frustrated. In recalcitrant cases, punishment has to be deterrent so that others similarly minded may warn themselves of the hazards of taking to a career of crime. But the novice who strays into the path of crime ought, in the interest of society, be treated as being socially sick. Crimes are not always rooted in criminal tendencies and their origin may lie in psychological factors induced by hunger, want and poverty. The C Probation of Offenders act recognises the importance of environmental influence in the commission of crimes and prescribes a remedy whereby the offender can be reformed and rehabilitated in society. An attitude of social defiance and recklessness which comes to a convict who, after a jail term, is apt to think that he has no more to lose or fear may breed a litter of crime. The object of the Probation of Offenders Act is to nip that attitude in the bud. Winifred A. Elkin describes probation D as a system which provides a means of re-education without the necessity of breaking up the offender's normal life and removing him from the natural surroundings of his home.[1] Edwin E. Sutherland raises it to a status of a convicted offender.[2]

The probationary system in our country is sometimes described as a boon of political freedom but that does less than justice to true E history. The Dharmashastras did not ordain similar punishment for similar offences irrespective of the antecedents and the physical and mental condition of the offender.[3] Dr. P. K. Sen has pointed out in his Tagore Law Lectures on "Penology Old and New" (1943) (p. 110) that the directions given by the ancient law-givers in the matter of punishment compare favourably with the advanced modern systems as regards the relevance of the objective circumstances attendant on the F commission of the crime and the subjective limitations of offenders. Probationary laws were passed by several erstwhile provinces prior to Independence but their provisions were seldom enforced in practice. Section 562, Code of Criminal Procedure, also contains a provision enabling the court to release certain offenders on probation of good conduct instead of sentencing them at once.

G There is no foundation for the fear that offenders released on probation may hold the society to ransom and the society may therefore look upon the release of offenders on probation as the triumph of criminals over the weaknesses of law. An offender released on probation is convicted but not forthwith sentenced in the sense of penal laws. Under the disposition made by the court the sentence is suspended

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(1) English Juvenile Courts (1938) page 162.

(2) Principles of Criminology, 4th Edn. (1947) page 383.

(3) History of Dharmashastra by Dr. P. V. Kane, Vol. III p. 392 (1946 Ed.).

during the period of probation. Section 4(1) of the Act provides that instead of sentencing the offender "at once", the court may direct his release on his entering into a bond to "receive sentence when called upon" during the probationary period and in the meantime to keep the peace and be of good behaviour. Thus it is only in a limited, though a socially significant, sense that the Act constitutes as exception to the broad and general principle of criminal law embodied, for example, in sections 245(2), 258(2), 306(2) and section 309(2), Code of Criminal Procedure, that a sentence shall follow on a conviction.

The provisions of the Act are indeed of such beneficence that in *Ratan Lal* v. *States of Punjab*(1) this Court remanded a matter to the High Court with a direction that the High Court or the Sessions Court should consider whether the Act should not be applied to an accused who was convicted on a date prior to the date on which the Act was brought into operation in the particular area and even though such a prayer was not made to the Sessions Court or in revision to the High Court and could not, of course, be made in the trial court. Subba Rao J. who gave the majority judgment said : "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." Raghubar Dayal J. dissented on the point whether the Act could be applied to an accused who was convicted before it came into force.

In *Isher Das* v. *The State of Punjab*(2) the trial court released on probation an offender who was convicted under section 7(1) of the Prevention of Food Adulteration Act, 1954. The High Court set aside that order and sentenced the accused to imprisonment for six months and a fine of Rs. 1000/-. In default of the payment of fine the accused was ordered to undergo imprisonment for a further period of a month and a half. Setting aside the order of the High Court this Court restored that of the Magistrate with the observation that though adulteration of food was a menace to public health, the application of the Probation of Offenders act could not be excluded in cases of persons found guilty of food adulteration.

In *Jai Narain* v. *The Municipal Corporation of Delhi*,(3) the principle laid down in Isher Das's case was affirmed but on the facts of the case this Court refused to release on probation an offender who was convicted for adulterating 'Patisa' by using a non-permitted coal tar dye. This decision only shows that whether the benefit of the Act should be extended in any praticular case must depend on the circumstance of that case.

There can therefore be no legal impediment in applying the provisions of the Probation of offenders Act to the respondents. Whether

(1) [1964] 7 S.C.R. 676. (2) A.I.R. 1972 S.C. 1295.
(3) A.I.R. 1972 S.C. 2607.

A on the facts and circumstances of the case the respondents may be released on probation cannot be put in issue at this late stage because it was neither urged in the trial court nor before the High Court that by reason of the antecedents or the propensities of the respondents it was not expedient to extend to them the benefit of the Act. The discretion vested in the trial court in this behalf must of course be exercised according to rules of reason and justice but the learned Magistrate had called for the report of the Probation Officer and it was on the basis of that report that the respondents were released on probation. The High Court has upheld the exercise of that discretion and we see no reason to interfere with the concurrent factual evaluation of the circumstances of the case. Accordingly we confirm the judgment of the High Court.

*Criminal Appeal No.* 115 *of* 1970 :

On June 27, 1968 three bars of foreign gold were found on the person of the respondent. He pleaded guilty at the trial whereupon the learned Presidency Magistrate, 6th Court, Calcutta convicted him under section 135, Customs Act, 1962 and under Rules 126 P (1)(i) and 126 P (2)(ii) of the Defence of India Rules, 1962. The respondent was sentenced to pay a fine of Rs. 150 for the offence under the Customs Act and a fine of Rs. 100 for the offence under Rule 126 P (1)(i). No separate sentence was imposed for the offence under Rule 126 P(2)(ii).

In appeal the High Court of Calcutta confirmed the conviction and sentence under the Customs Act. Regarding the contravention of the two Rules, the High Court held that no declaration need have been made by the respondent to the Administrator, as the gold of which the respondent was in possession was smuggled gold and not "legal" gold. According to the High Court "the legislature never expected that smuggled gold would be declared". The High Court therefore set aside the conviction and sentence imposed on the respondent for contravention of the "Gold Control" Rules.

Part XII-A "Gold Control" (consisting of Rules 126A to 126Z) was inserted in the Defence of India Rules, 1962 by G. S. R. 89 dated January 9, 1963. Rule 126A (d) defines gold for the purposes of Part XIIA thus :

> "gold" means gold, including its alloy, whether virgin, melted, remelted, wrought or unwrought, in any shape or form, of a purity of not less than nine carats and includes any gold coin (whether legal tender or not), any ornament and any other article of gold;"

Some of the other Rules in Part XIIA provide as follows to the extent material. Under Rule 126, every person must within the stipulated period make a declaration to the Administrator as to the quantity, description and other prescribed particulars of gold owned by him. Failure or omission, without reasonable cause, to make such a declaration is made punishable by Rule 126 P (1)(i). Possession of gold in contravention of any provision of Part XIIA is made punishable by Rule 126 P(2)(ii).

We see no justification in the scheme of the Rules for the view taken by the High Court that smuggled gold is not comprehended within Rule 126P of the Gold Control Rules. The definition of "gold" in Rule 126A (d) is couched in wide terms and it does not make any distinction between smuggled gold and gold lawfully possessed. The High Court says that the legislature could not have intended that a person in possession of smuggled gold should make a declaration in regard thereto. The intention of the legislature must be gathered primarily and principally from the words used by it and the definition of "gold" carves out no exception in favour of smuggled gold. Secondly, if the intention of the legislature as reflected in the scheme of a law is to control the meaning of the words used in a particular Section or Rule, it strikes us as surprising that the obligation to declare gold should be imposed on lawful possessors of gold but should leave untouched the possession by smugglers or their agents of gold smuggled into the country. Under the definition contained in Rule 126A (d), "gold means gold" and no rule of statutory construction can permit the definition to be altered materially so as to read: "Gold means gold but shall not include smuggled gold". To put such a construction on the definition is to coin a new definition and therefore to legislate.

The word "gold" is used at several places in Part XIIA and it is a well-recognised rule of construction that the same word should receive the same meaning in a collocation. Rule 126A (c)(ii) defines a dealer as a person who carries on the business of buying, selling, supplying etc. gold for the purpose of making ornaments. Rule 126 B(1)(a) provides that a dealer shall not make or manufacture any article of gold other than ornament; sub-clause (b) provides that a refiner shall not make or manufacture any article of gold other than primary gold; sub-clause (c) provides that no other person shall make or manufacture any article of gold, unless the dealer, refiner or such other person is authorised by the Administrator to make or manufacture such an article. Rule 126C provides that no dealer shall make and no person shall place any order for making an ornament containing gold of a purity exceeding 14 carats. Rule 126D contains a prohibition on loans being granted on the security of gold unless such gold is included in a declaration made under Rule 126I. Rule 126F requires every dealer and refiner to submit a return in regard to the gold in his possession of control. Under Rule 126G dealers and refiners must keep an account of the gold bought or sold by them. Rule 126H provides that no dealer or refinery shall have in his possession or under his control any gold which has not been included in the return which he is required to submit under the Rules. Rule 126I, with which we are directly concerned in this case, provides that every person other than a dealer or a refiner, shall within the stipulated period make a declaration to the Administrator as to the quantity, description and other particulars of gold other than ornament), owned by him. Clause (3) of this Rule provides that no person who is required to make a declaration shall acquire any gold other than ornament except by succession or under a permit granted by the Administrator. Rule 126L confers power under the authority of the Administrator to seize any gold in respect of which the provisions of Part XIIA are contravened. Under Rule 126 M gold thus

A seized is liable to confiscation. Rule 126P (1)(i) makes failure or omission to make a declaration as required by Rule 126I punishable. Rule 126P (2) (ii) prescribes punishment for possession of gold in contravention of the provisions of Part XIIA.

It is manifest from the language, intendment and the scheme of these Rules that the word "gold" covers not only gold which is lawfully B possessed but gold in any form or shape and whether possessed lawfully or otherwise. In the economic context in which Part XIIA was inserted into Defence of India Rules in 1963, it is impossible to hold that the legislature wanted to regulate the possession and control of gold lawfully possessed as distinguished from smuggled gold. It seems to us clear that the prohibition in regard to the manufacture of articles of gold would apply even to articles made out of smuggled gold and it C would be no defence for a dealer, refiner or for any other person to say that he had not contravened the provisions of Rule 126B because he had made an article out of smuggled gold. Such a defence, we suppose, would be all the worse for him. Similarly, it would be no defence to a charge under Rule 126D to say that a loan was advanced on the pledge of smuggled gold. The various Rules which we have set out above make it clear that the object of introducing Part XIIA D is, as shown for example by Rule 126H, that if any gold is acquired a declaration has to be made in regard thereto, no matter how or by what means it is acquired. We are therefore unable to agree with the High Court that the respondent was not liable to make under Rule 126I a declaration as to the gold in his possession and that therefore Rule 126P is not attracted. The view taken by a learned single Judge of the High Court of Mysore in *K. Vishnumoorthi* v. *State of Mysore* E *& Anr.*(1) that "gold" as defined in Part XIIA includes smuggled gold is, in our opinion, correct. We are not concerned in this case to determine whether on the particular facts of the case the Mysore High Court was right in refusing to apply section 4 of the Probation of Offenders Act to the case before it.

The order of the learned Magistrate convicting and sentencing the respondent under section 135 of the Customs Act as also under Rule F 126P of the Defence of India Rules must therefore be restored.

V.P.S. *Appeals allowed.*

(1) [1971] 2 Mys. L. J. 261.