

## STATE OF MAHARASHTRA

v.

KAPUR CHAND KESARIMAL JAIN

January 30, 1981

[A. D. KOSHAL, V. BALAKRISHNA ERADI AND R. B. MISRA, JJ.]

*Probation of Offenders Act—Section 4—Criteria for application of section.*

The respondent was convicted for offences under section 135 of the Customs Act and the Defence of India Rules for smuggling contraband gold into the country and was variously sentenced. When his appeal came to this Court, the case was remanded to the High Court for a fresh decision.

On remand the High Court accepted the prayer of the respondent that he be given the benefit of section 4 of the Probation of Offenders Act on the grounds that the contraband gold recovered from him had been confiscated; that he had been facing criminal litigation for a period of seven years which resulted in a lot of monetary expense and mental agony on his part; that he was behind the bars for a period of five months, that no other case on the criminal side was pending against him and that he was not in a position to pay any fine.

In appeal to this Court it was contended on behalf of the State that in giving the benefit of section 4 of the Act, the High Court did not exercise its discretion properly.

Allowing the appeal,

HELD : Recourse to section 4 was not at all called for, the time lag between the commencement of the trial and the pronouncement of the impugned judgment notwithstanding. [737F-G]

One of the major criteria in determining whether the benefit of the provisions of section 4 of the Act should be given to the offender or not is the nature of the offence. The other relevant factors are the age of the offender and the circumstances in which the offence was committed. [737B-C]

In the instant case none of these factors goes to help the respondent because he was not a immature youth at the time of the commission of the offences; he was not less than 24 years of age then. The offences involved possession of a large quantity of contraband gold. That he was apparently a regular smuggler is evident from the fact that a large quantity of gold with foreign marking and a number of empty jackets meant for storage of the gold were found in his possession. The fact that such offence had become rampant and had already endangered the economy of the nation is part of current history and a Court cannot look upon the present state of affairs with equanimity and deal with such offences leniently. [737C-E]

There is nothing on the record to show that the respondent was not in a position to pay any fine. [737F]

**A** CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 365 of 1975.

Appeal by Special Leave from the Judgment and Order dated 26-6-1973 of the Bombay High Court in Criminal Appeal No. 504/72.

**B** *V. S. Desai* and *M. N. Shroff* for the Appellant.

*Anil Kumar Gupta* for the Respondent.

The Judgment of the Court was delivered by

**C** KOSHAL, J.—The respondent in this case was convicted by the Additional Chief Presidency Magistrate, 19th Court, Esplanade, Bombay for an offence under clause (a) read with clause (i) of section 135 of the Customs Act, another under clause (b) read with clause (i) of that section and still another under Rule 126(H) (IA) read with Rule 126-P(ii) & (iv) of the Defence of India Rules. He was sentenced to rigorous imprisonment for two years and a fine of Rs. 20,000/- and in default of payment of fine to rigorous imprisonment for 4-1/2 months on each of the first two counts, and to rigorous imprisonment for six months and a fine of Rs. 10,000/- on the third count, the sentence in default of payment of fine being rigorous imprisonment for 3 months.

**E** The conviction recorded against and the sentence imposed upon the respondent were challenged by him right upto this Court which remanded the case to the Bombay High Court for a fresh decision. Before the High Court, no challenge was made after remand to the conviction and the only prayer made was that the respondent be given the benefit of Section 4 of the Probation of Offenders Act (hereinafter referred to as the Act). That prayer was accepted by the High Court on the following five grounds :—

**F** (a) The contraband gold recovered from the respondent (which amounted to 2015 tolas) has been confiscated by the Customs authorities.

**G** (b) By the time the High Court pronounced its judgment after remand, the respondent had been facing criminal litigation for a period of 7 years which resulted in a lot of monetary expense and mental agony on his part.

(c) The respondent had already been behind the bars for a period of 5 months.

**H** (d) No other case on the criminal side was pending against the respondent.

(e) The respondent was not in a position to pay any fine.

It has been vehemently argued on behalf of the State by Mr. Desai that in giving the benefit of Section 4 of the Act to the respondent, the High Court did not exercise its discretion properly and we find ourselves in agreement with him in spite of the learned arguments advanced by Mr. Gupta appearing as *amicus curiae* in support of the impugned judgment.

We may mention at the very outset that under Section 4 of the Act, the nature of the offence is one of the major criteria for determining whether benefit of its provisions is to be given to the concerned offender or not. His age would be another relevant factor. The circumstances in which the offence was committed may be a third important consideration. None of these factors, as appearing in the present case, goes to help the respondent. The respondent was not an immature youth at the time of the commission of the 3 offences brought home to him, being no less than 24 years of age. The offence committed by him, as already pointed out, involved possession of no less than 2015 tolas of contraband gold and it may well be that the respondent was a regular smuggler, for had that not been the case, there is no reason why he should have been found in possession of such a large quantity of gold with foreign markings and a number of empty jackets meant for storage of the precious metal. From one point of view the offence may not be considered heinous as it merely contravenes a law prohibiting illegal gain simpliciter, there being no element of detriment to the life and liberty of others, but then the fact that such offences have become rampant and have already endangered the economy of the nation is part of current history and this Court cannot look upon the present state of affairs with equanimity and deal with the commission of such offences leniently. Nor do we find that there was any material whatsoever on the record to justify the observation by the High Court that the respondent was not in a position to pay any fine.

In this view of the matter, we think that recourse to section 4 of the Act was not at all called, for the time-lag between the commencement of the trial and the pronouncement of the impugned judgment notwithstanding. Consequently, we set aside that judgment in so far as it concerns the use of that section and restore instead the conviction recorded against and the sentence imposed upon the respondent by the trial Court on each of the three counts. He shall be taken into custody forthwith.

The appeal is disposed of accordingly.

N.K.A.

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*Appeal allowed.*