

CASE NO.:
Appeal (crl.) 609 of 1999

PETITIONER:
Prithvi Raj and Ors.

RESPONDENT:
Kamlesh Kumar and Anr.

DATE OF JUDGMENT: 20/09/2004

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

Two interesting questions both revolving round Section 11 of the Probation of Offenders Act, 1958 (in short the 'Act') are involved in this appeal. Though the questions are essentially of law, a brief reference to the factual aspect would be necessary.

Appellants faced trial for alleged commission of offences punishable under Sections 307, 323, 324 and 326 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Learned Sessions Judge, Karauli, Rajasthan, held that though accusations relating to Sections 307, 307 read with Section 149 were not proved against the accused persons, offence of Section 324 IPC was proved against accused-appellant Prithvi Raj while offence under Section 324 read with Section 149 IPC was proved against others. Offence in terms of Section 323 IPC was held to be proved against Tej Raj and offence under Section 323 read with Section 149 was proved against others. Offence under Section 148 IPC was also held to be proved. After hearing the accused persons on the question of sentence, it was noticed that there was no allegation of any earlier involvement in crime against any of the accused persons, the incident was an old one, two of the accused were students and accused Ratan was an aged person. Taking into account all these facts the trial court held that compelling reasons were there for the accused persons to reform in life. Accordingly while imposing sentence the trial court extended benefits under the Act and held that they were to be on probation for two years to keep good behaviour and were to execute personal security of Rs.3000/- each with similar amount of bail bonds. Each was ordered to pay Rs.1500/- as compensation, out of which Rs.7500/- was directed to be paid to injured Radhey Shyam.

An appeal purported to be under Section 11(2) of the Act was filed before the High Court by the complainant contending that the benefits of Section 3/4 of the Act were wrongly extended to the accused persons. It is to be noted that an appeal was preferred by the accused persons against the direction for payment of compensation. Same was registered as SB Criminal Appeal No.458/98 and was dismissed. The High Court held that Section 5 of the Act permitted compensation to be awarded when benefit of Section 4 of the Act was extended.

In appeal filed by the defacto complainant, apart from questioning benefits under the Act, correctness of the conclusions regarding nature of offence were also assailed. The High Court was of the view that the trial court was not justified in holding that no

offence under Section 307 or 326 was made out. It was held that the accused persons were liable to be held guilty for offence punishable under Section 326 IPC. The matter was remitted to the trial Court to award sentence for such offence.

In support of the appeal Mr. L. Nageswara Rao, learned senior counsel submitted that scope and ambit of sub-section (4) of the Act has not been kept in view by the High Court. In appeal filed in terms of Section 11(2) of the Act, Appellate Court or the High Court, as the case may be, has jurisdiction to set aside the order made under Section 3 or Section 4 and in lieu thereof pass sentence according to law. There was no scope for altering the nature of offence. Additionally, it was submitted that defacto complainant has no right to file an appeal under sub-section (2) of Section 11. Strong reliance was placed on the decision of the Division Bench of the Calcutta High Court in Parmal Ghosh v. State of West Bengal and Ors. (1984 CrL. L.J. 1302). There was no appearance for respondent no.1 (complainant).

Learned counsel for the State supported the stand of the appellants as regards the scope of adjudication under Section 11(4) of the Act.

In order to appreciate the issue involved it would be proper to quote Section 11 so far relevant. The provisions read as:

"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.

(2) Notwithstanding anything contained in the Code, where an order under Section 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.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the court by which he is found guilty declines to deal with him under Section 3 or Section 4 and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred then, notwithstanding anything contained in the Code or any other law, the Court to which appeals ordinarily lie from the sentences of the former court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under Section 3 or Section 4 in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law.

Provided that the Appellate court or the High

Court in revision shall not inflict a greater punishment than might have been inflicted by the court by which the offender was found guilty".

The first question is whether defacto complainant can prefer an appeal under sub-section (2) of Section 11. The provision only speaks of the forum in which such appeal is to be decoded. It does not specifically provide as to who can prefer an appeal. There is a divergence in view as regards maintainability of appeal by the complainant. Orissa and Patna High Courts have held that it was maintainable at the instance of the defacto complainant. (See *Rajkishore Jena v. Raja, alias Kalasi Sahu and Ors.* (AIR 1971 Orissa 193) and *Baidyanath Prasad v. Awadhesh Singh and Ors.* (AIR 1964 Patna 358). It was held by the Patna High Court that the complainant can file revision against the order of acquittal under the Code of Criminal Procedure, 1973 (in short the 'Code'). Consequently, it was observed that the complainant has interest in conviction and sentence. Orissa High Court dismissed the revision petition filed by the complainant holding that it had right of appeal to Sessions Court under Section 11(2) of the Act. Calcutta High Court in *Parmal Ghosh v. State of West Bengal and Ors.* (1984 CrL. L.J. 1302) has taken a different view and held that the State has a right to be heard at the time of imposition of sentence but not the complainant. The role of the State Government is to ensure that the accused person is punished for the offence committed and adequate sentence is imposed. If the State is of the view that the sentence is inadequate it can move the higher court as provided in the Code.

The language of Section 11(2) is unrestricted as to the person who can prefer an appeal. Therefore, there is no justification for confining the right only with the convicted person or even to the State. The issue can be looked at from another angle. Under the revisional jurisdiction the High Court in an appropriate case can direct re-trial though it cannot convert the order of acquittal to an order of conviction. When an application in revision is allowed by the Court against the order of acquittal at the instance of the private party, the High Court is obliged in law to remand the appeal. But in all other circumstances the High Court is competent to pass any order that may be passed by a court of appeal.

It is to be noted that sub-section (2) of Section 11 commences with the expression "notwithstanding anything contained in the Code" and provides in unqualified terms that "an appeal shall lie to the Court". Under the Code the appeal proceedings are concerned only with orders of acquittal or conviction. While the provisions in Section 11(2) of the Act deal with something distinct from the fact of conviction or acquittal. The appeal under Section 11(2) of the Act is not against acquittal or conviction but the propriety of the order passed under Section 3 or Section 4 of the Act. The intention of the legislature apparently is to confer such a right both on the prosecution and the accused. The interest of the complainant is not totally lost sight of by the legislature. It is statutorily provided that revision application can be filed by the complainant against an order of acquittal. That being so, the complainant can prefer an appeal under Section 11(2) of the Act questioning propriety of the order passed under Section 3 or 4 of the Act. The view expressed by the Patna and the Orissa High Courts is the correct view and that of the Calcutta High Court is not correct. The said view is nullified.

That brings us to the pivotal issue as to the scope and limit of interference in an appeal under Section 11(2) of the Act. Section 11(4) makes the position clear that only the propriety of the order passed under Section 3 or 4 in respect of offenders can be dealt with by the Appellate Court or High Court as the case may be. The Appellate Court

or the High Court exercising revisional power may set aside such order, meaning passed either under Section 3 or Section 4 and in lieu thereof pass sentence on such offender. Obviously, the sentence can be imposed only in respect of the offence relating to which the order under Section 3 or Section 4 of the Act has been passed. There is no scope of altering nature of offence and for directing that the accused shall be convicted for another offence. The High Court was, therefore, not justified in directing that the conviction of the appellants shall be under Section 326 IPC. We find that the trial court had given adequate reasons for passing the order under Section 4 of the Act. That being so, the High Court was not justified to interfere with the benefit extended by the trial court under the Act.

The judgment of the High Court is set aside and that of the trial court is restored.

The appeal is allowed.