

STATE OF JAMMU AND KASHMIR

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v.
VINAY NANDA

JANUARY 16, 2001

[K.T. THOMAS AND R.P. SETHI, JJ.]

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Jammu & Kashmir Prevention of Corruption Act, Svt. 2006:

Section 5(2) proviso—Minimum sentence—Imposition of – Criteria to award—Held: Where there are mitigating circumstances minimum sentence may be awarded for ‘special reasons’—‘Special reasons’ have to be distinguished from ‘good’ or other reasons’—Reaching superannuation is not a ‘special reason’—Similarly, prolonged litigation is not a ‘special reason’—Hence, under these circumstances minimum sentence may not be awarded.

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Jammu & Kashmir Probation of Offenders Act, 1966:

Section 18—Benefit of probation—Applicability of—Accused convicted under S.5(2) of the J & K Prevention of Corruption Act and awarded imprisonment for one year and fine of Rs. 16,000—High Court gave the accused benefit of J & K Probation of Offenders Act—Correctness of—Held : J & K Probation of offenders Act is not applicable to offences under the J & K Prevention of Corruption Act—Hence, High Court erred in giving the benefit of J & K Probation of Offenders Act to the accused.

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Words and Phrases:

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“Special reasons”—Meaning of—In the context of Section 5(2) of the Jammu & Kashmir Prevention of Corruption Act. Svt. 2006.

The respondent-accused was convicted under Section 5(1)(c) of the Jammu & Kashmir Prevention of Corruption Act, Svt. 2006 and sentenced to undergo rigorous imprisonment for one year and to a fine of Rs. 16,000. On appeal, the High Court upheld the conviction but gave the respondent the benefit under the Jammu & Kashmir Probation of Offenders Act, 1966. Hence this appeal.

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On behalf of the accused it was contended that as there existed

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A special circumstances the accused be not sent to jail; and that since the accused had reached superannuation the minimum sentence in terms of the proviso to Section 5(2) of the J & K Prevention of Corruption Act, Svt. 2006 be awarded to him.

Allowing the appeal, the Court

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HELD: 1. In view of the unambiguous and categorical provisions of Section 18 of the Jammu & Kashmir Probation of Offenders Act, 1966, it must be held that the High Court was not justified in giving the respondent the benefit of the Jammu & Kashmir Probation of Offenders Act, 1966 as the said Act was not applicable to offences under the Jammu & Kashmir Prevention of Corruption Act, Svt. 2006. [404-A; 404-B]

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2.1. Where the mandate of law is clear and unambiguous, the court has no option but to pass the sentence upon conviction as provided under the statute. [405-C]

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Aditya Nath Pandey v. State of U.P., [2000] SCC (Cr. P.) 1206; *Vidyadhar Ganesh Lanjekar v. State of Maharashtra*, [1993] Cr. P. Law Journal 3667 and *Ghulam Din Buch v. State of J & K*, [1996] 9 SCC 239, held inapplicable.

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2.2. The mitigating circumstances in a case, if established, would authorise the court to pass such sentence of imprisonment or fine which may be deemed to be reasonable but not less than the minimum prescribed under an enactment. For imposing the minimum sentence the court has to record special reasons. 'Special reasons' have to be distinguished from 'good' or 'other reasons'. The fact that the convict had reached his superannuation is not a special reason. Similarly, pendency of criminal case for over a period of time can also not be treated as a special reason. Prolonged litigation in the country is admittedly a general reason in criminal cases. None of the circumstances stated by the respondent in his affidavit by itself constitute a 'special reason'. [405-F-G-H; 406-D]

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Jagjevan Prasad v. State of MP, [2000] 8 SCC 22, relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 82 of 2001.

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From the Judgment and Order dated 19.05.2000 in CRLFA 29/95 of the

High Court of J & K at Jammu.

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Jaspal Singh, Ashok Mathur, Pawan Kumar Bahl, Harish Kumar and M.M. Kashyap for the appearing parties.

The Judgment of the Court was delivered by

SETHI, J. Leave granted.

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Corruption at any level, by any person, of any magnitude is condemnable which cannot be ignored by the judicial courts, when proved. No leniency is required to be shown in proved cases under the Prevention of Corruption Act which itself treats the offences under it of a special nature to be treated differently than the general penal offences. The convicts of the offences under the Act are to be dealt with heavy hand and deterrent rod. No populous or sympathetic approach is needed in such cases. The only exception is the existence of special circumstances for awarding the minimum sentence.

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The important point of law involved in the present appeal is as to whether the benefit of Jammu & Kashmir Probation of Offenders Act can be extended to the convicts under the Jammu & Kashmir Prevention of Corruption Act, Svt. 2006 (hereinafter referred to as "the Act").

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The facts giving rise to the determination of the question noted hereinabove are that the respondent, when posted as cashier in the Procurement Department of the State of Jammu & Kashmir, tampered the record regarding the carriage of store articles to and fro through RTC vehicles. The word "RTC" was changed into "one RTC Vehicles" and the words "RTC was changed into the words "BTC". After withdrawing Government money for making payment to the carriers, the respondent was alleged to have misappropriated the amount with the connivance of his superior officers. It was specifically stated in the complaint filed against him that with the connivance of the Account Officer Shri Babu Ram Sharma the respondent encashed a cheque of Rs. 89,000 from the Treasury and misappropriated the same. On receipt of the complaint against the respondent, a preliminary enquiry was conducted during which it transpired that accused had in fact misappropriated the amount upon which a regular FIR No.23 of 1987 was registered and investigation commenced. During the investigation it was found that Cheque No. 0547185 for an amount of Rs.97,952.11 was encashed by the respondent-accused but instead of remitting the amount into the Treasury, he misappropriated the same. To conceal the embezzlement he

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- A defalcated the account by making a false entry of remittance in cash book at Page No.41. The accused confessed the non remittance of the account and when show cause notice was issued to him on 1.3.1985, he refunded the said amount in different instalments during the years 1985-87. After completion of the investigation charge-sheet was filed in the court of Special Judge, Anti Corruption, Jammu who charged him for the commission of offences under
- B Section 5(2) of the Act and Sections 409 and 468 of the Ranbir Penal Code vide its order dated 1st May, 1991. The accused pleaded not guilty to the charge and claimed to be tried.

- To prove its case, the prosecution had examined S/Sh. Davinder Singh,
- C Shambu Nath, Dharampal, Om Parkash, Nertar Parkash, Babu Ram, Romesh Kumar Bali, Khajour Singh, Suram Singh, Bal Krishan, Jagdish Chander, Radhey Shayam, Kuldeep Khoda, R.P. Abrol and Ranbir Singh as witnesses. In his statement recorded under Section 342 of the Code of Criminal Procedure corresponding to Section 313 of the Central Criminal Procedure Code, the
- D respondent denied all the allegations. After critically examining the evidence led in the case, the Special Judge, vide an elaborate judgment found the respondent guilty of commission of offences under Section 5(1)(c) of the Act and Section 409 and 468 of the Ranbir Penal Code. Upon his conviction the respondent was sentenced to undergo imprisonment for one year on each count besides paying a total fine of Rs. 16,000. All the sentences were
- E directed to run concurrently.

- Not satisfied with the judgment of the Special Judge, the respondent filed an appeal which was disposed of by the judgment impugned in this case by upholding the conviction of the respondent but giving him the benefit of probation under the Jammu & Kashmir Probation of Offenders Act. He was
- F directed to furnish a bond for maintaining good conduct for a period of three years and to pay costs in terms of Section 5(1)(b) of the said Act which were assessed at Rs. 2000. The costs were to be deposited with the Registrar (Judicial) within a period of three months. In case that direction was not complied with, the respondent was ordered to suffer jail sentence for six
- G months.

Feeling aggrieved by the judgment of the High Court, the present appeal has been filed by the State. However, the respondent has not challenged the finding of fact arrived at by the High Court.

- H In his judgment, the learned Single Judge of the High Court held:

"The facts which are undisputed are:

- (i) That a sum of Rs. 97,952.11 was withdrawn by the appellant by self cheque No. 0547185. This was done on 30.8.1984.
- (ii) The aforementioned amount was not deposited in the account.
- (iii) That a Senior Officer namely Babu Ram on checking the account found that the aforementioned amount though withdrawn was not deposited in the State Treasury.
- (iv) That an enquiry was held. Thereafter the appellants deposited the amount on various dates. This was of course done before the present criminal investigation started in this case."

The plea of the respondent that while he was on his way to deposit the entire amount in the Jammu & Kashmir Bank a sum of Rs. 40,000 was lost, was held to have been not substantiated. Deposits were proved to have been made after the factum of withholding the money by the respondent came to the notice to his superior officer, Sh. Babu Ram Sharma.

The trial court as well as the High Court has concurrently held the accused guilty for the commission of the offences with which he was charged. However, the High Court was persuaded to take a sympathetic view in the matter on the existence of circumstances justifying a lenient action and benefit of the Jammu & Kashmir Probation of Offenders Act was given as noticed earlier. It appears that the learned Single Judge of the High Court was not apprised of the relevant provisions of the Jammu & Kashmir Probation of Offenders Act, 1966 (hereinafter referred to as "the 1966 Act") which resulted in the passing of the judgment impugned. Sub-section (3) of Section 1 of the 1966 Act provides that:

"It shall come into force on such date as the Government may, by notification in the Government Gazette, appoint and different dates may be appointed for different parts of the State."

The Act has been enforced in the Cities of Jammu & Srinagar w.e.f. 15th May, 1969 by SRO 267 dated 3rd May, 1969 and in the Districts of Jammu & Srinagar w.e.f. 15th January, 1970 by SRO 23 dated 15th January, 1970. Despite its extension to whole of the State of Jammu & Kashmir its provisions are not shown to have been applied to the other parts of the State.

Section 18 of the said Act reads:

A “Saving of operation of certain enactments: Nothing, in this Act shall, affect the provision of sub-section (2), of section 5 of the Jammu and Kashmir Prevention of Corruption Act Svt. 2006 or the supersession of Immoral Traffic in Woman and Girls Act, 1956 (Central Act of 1956) or any law in force in the State relating to Juvenile Offenders.”

B In view of unambiguous and categoric provisions of Section 18 of the Jammu & Kashmir Probation of Offenders Act, it is incumbent upon us to hold that the High Court was not justified in giving the respondent the benefit of the Jammu & Kashmir Probation of Offenders Act as the said Act was not applicable to offences under the Act. We are sure that had the provisions of C the 1966 Act been brought to the notice of the High Court, the order impugned could not have been passed. The judgment impugned in this appeal is, therefore, liable to be set aside.

D Faced with this situation, the learned counsel for the respondent submitted that the case be remitted back to the High Court for deciding it afresh. We are not impressed by this submission inasmuch as concededly the respondent has not filed any appeal against the finding of conviction recorded by both the courts against him. Under the circumstances of the case no useful purpose would be served by remanding the case.

E Mr. Jaspal Singh, learned Senior Advocate appearing for the respondent then submitted that as there exist special circumstances, the respondent be not sent to the jail at this stage particularly when he has complied with the directions of the High Court. To appreciate this submission a reference has to be made to the provisions of the Act prescribing sentence upon conviction under it. Section 5(2) of the Act, as substituted by Act No.9 of 1993, provides:

F “Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend seven years and shall also be liable to fine:

G Provided that the court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year but not less than six months.”

H It is the mandate of law that a person convicted under the Act can be sentenced for a term upto seven years and not less than one year. According to the proviso, the sentence can further be reduced to six months only “for

any special reasons recorded in writing”.

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Relying upon the judgments of this Court in *Aditya Nath Pandey v. State of U.P.*, [2000] SCC (Cri.) 1206; *Vidyadhar Ganesh Lanjekar v. State of Maharashtra*, [1993] Cri.Law Journal 3667 and *Ghulam Din Buch & Ors. v. State of J & K*, [1996] 9 SCC 239 the learned Senior Counsel appearing for the respondent has submitted that in view of peculiar and special circumstances of this case, the ends of justice would be met only by awarding the sentence of fine to his client without sending him to jail at this stage. However, the perusal of the aforesaid judgments indicates that in none of the cases the Court considered the effect of provisions of law prescribing the minimum sentence upon conviction under the Act. Where the mandate of law is clear and unambiguous, the Court has no option but to pass the sentence upon conviction as provided under the statute. In *Ghulam Din Buch's* case the Court considered the scope of Section 5(2) of the Act prior to its amendment, when it observed:

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“Though the proviso permits not to impose a sentence of imprisonment at all and confines the sentence to fine only, we do not think if the present is a case where the punishment to be awarded should be only fine, as any softness in this regard would produce an undesirable result, namely, encouragement to adoption of corrupt means by public servants which has indeed to be checked, and not allowed to be encouraged. Keeping in view all the attending circumstances, we are of the view that a sentence of RI for two months would be adequate sentence, apart from the fine of Rs.15,000.”

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The mitigating circumstances in a case, if established, would authorise the Court to pass such sentence of imprisonment or fine which may be deemed to be reasonable but not less than the minimum prescribed under an enactment.

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On behalf of the respondent it has been argued in the alternative that upon conviction the minimum sentence in terms of proviso to sub-section (2) of Section 5 of the Court be awarded in the case. For imposing the minimum sentence the court has to record special reasons. ‘Special reasons’ have to be distinguished from ‘good’ or ‘other reasons’. The fact that the convict had reached his superannuation is not a special reason. Similarly pendency of criminal case for over a period of time can also not be treated as a special reason. Prolonged litigation in the country is admittedly a general reason in criminal cases. This Court under similar circumstances in *Jagjeevan Prasad*

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A *v. State of M.P.*, [2000] 8 SCC 22 observed:

“Yet another consequence would be that if any public servant succeeds in protracting the criminal proceedings to the stage of superannuation he can also claim the benefit of “special reasons”, if the High Court’s reasoning is to be accepted. We find the High Court’s approach not only erroneous but pernicious, and therefore, impermissible in law. Such a ground cannot by any stretch of imagination be treated as “special reasons”.”

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The respondent has filed an affidavit in this Court stating therein that he was facing the trial since 1987 and the amount allegedly misappropriated has already been deposited by him with the Government. He submits to have been punished departmentally vide orders of the Chief Engineer dated 13.1.1993. He claims to be the only bread earner in the family who has to support his wife, one unmarried daughter and two sons aged about 18 and 17 years. None of the circumstances, stated in his affidavit, by itself constitute a “special reason”. However, keeping in view the general conspectus of the case, we feel that under the totality of the circumstances narrated, the respondent has made out a case for invoking the proviso to Sub-section (2) of Section 5 of the Act. We have further been persuaded to give him such a benefit in view of the observations made in his favour by the trial court in para 55 of its judgment and the High Court in the judgment impugned before us.

Under the circumstances, the appeal is allowed by setting aside the impugned judgment of the High Court and restoring the judgment of the trial court by which the accused-respondent has been convicted and sentenced for offence as noticed earlier. However, giving the respondent benefit of proviso to sub-section (2) of Section 5 of the Act, the sentences of imprisonment awarded to him for all the offences are reduced from one year to six months. Such terms of imprisonments of the sentences would run concurrently. Sentences of fine imposed upon the respondent amounting to Rs. 16,000 in all are also reduced to Rs. 5,000. The respondent shall be taken into custody to undergo the sentence on all account for a period of six months and to pay the fine in terms of the order of the trial court. In default of the payment of fine he will undergo further imprisonment as awarded to him by the trial court.

V.S.S.

Appeal allowed.