

COMMANDANT 20 BN. ITB POLICE

A

v

SANJAY BINJOLA

MAY 2, 2001

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

B

Code of Criminal Procedure, 1973.

Section 386—Clause (e)—Appellate Court—Power to make amendment in the impugned order—Power to make incidental order that may be just and proper—Scope of power—Does not include power to interfere with service career of the accused.

C

Indo Tibetan Border Police—Constable—Conviction under Section 10(n) of the Central Reserve Police Force Act, 1949—Appeal—Direction given by appellate court—Conviction and sentence should not affect service career of the accused—Held invalid.

D

Probation of Offenders Act, 1958—Sections 3 and 4

Object of the Act discussed—Accused convicted under Section 10(n) of the Central Reserve Police Force Act, 1949—Held, Entitled to benefit of probation.

E

The respondent, a Constable of Indo-Tibetan Border Police, was convicted under Section 10(n) of the Central Reserve Police Force, Act, 1949 and sentenced to imprisonment for a period of three months. The appellate court modified the sentence but further directed that the order passed by it shall not adversely affect the service career of the accused. This direction given by the appellate court was challenged in revision before the High Court. Relying upon clause (e) of Section 386 of the Code of Criminal Procedure, 1973 the High Court held that the appellate court had the power to pass the impugned order.

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In appeal to this Court it was contended on behalf of the appellant that the appellate as well as the revisional court had no jurisdiction to direct that the conviction and sentence awarded to the respondent would not adversely affect his service career.

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A On behalf of the respondent it was contended that even if it is conceded that the High Court had no jurisdiction to pass the impugned order, the said order may be treated to have been passed under the Probation of Offenders Act, 1958.

B Allowing the appeal and setting aside the impugned order, the Court

C HELD : 1. The High Court committed a mistake of law by clothing the order of the appellate court to be an order passed in terms of Section 386 of the Code of Criminal Procedure, 1973. After passing the order of conviction and sentence, the criminal court should not have issued any direction relating to the service career of the respondent which is governed by the Act, Rules made thereunder the service rules governing his conditions of service.

[372-C]

D 2. Clause (e) of S.386 of Cr. P.C. empowers the Court to make any amendment or pass any consequential or incidental order that may be just or proper. Orders contemplated under the said clause are only such orders which are permissible under the Code or any other law in force. Such a power does not confer a jurisdiction upon the appellate court to pass orders which tend to interfere with the service career of the convict. Amendment of the order means amendment of the main order and does not empower the court to pass an order which affects the rights of a party not before it.

E Incidental or consequential orders are such orders which are permissible under law and likely to follow as a result of the main order. The consequential or incidental orders contemplated under clause (e) are orders which follow as a matter of course being necessary compliments to the main orders without which the latter would be incomplete and ineffective, such as issuance of directions for refund of fine realised from accused ultimately acquitted or

F on the reversal of acquittal any direction as to punishment, fine or compensation payable under Section 250 of the Code and the like.

[371-G-H; 372-A-B]

G 3. Probation of Offenders Act, 1958 has been enacted in view of the increasing emphasis on the reformation and rehabilitation of the offenders as a useful and self-reliant members of society without subjecting them to deleterious effects of jail life. The Act empowers the Court to release on probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life or for the description mentioned in Sections 3 and 4 of the said Act. [372-F]

H 4. It is true that nobody can claim the benefit of Sections 3 and 4 of

the Probation of Offenders Act as a matter of right and the court has to pass appropriate orders in the facts and circumstances of each case having regard to the nature of the offence, its general effect on the society and the character of the offender, etc. There are laws which specifically direct that the provisions of Probation of Offenders Act shall not apply to the persons convicted for those offences and there may be cases under other laws as well which may not justify the exercise of the powers of Probation of Offenders Act. Even apart from such exclusions the courts should be wary of extending the benefit of Probation of Offenders Act to offences relating to corruption, narcotic drugs, etc. However, in a case of a trivial nature as the respondent is stated to have committed and keeping in view its peculiar circumstances, it is a fit case where powers under Section 3 of the Probation of Offenders Act can be exercised. [373-G-H; 374-A-C]

Despite confirmation of conviction by the Sessions Judge, the respondent be given the benefit of Probation of Offenders Act. The respondent shall also be entitled to the benefit of Section 12. [374-D]

Dalbir Singh v. State of Haryana, [2000] 5 SCC 82, explained and distinguished.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 591 of 2001.

From the Judgment and Order dated 11.2.2000 of the Allahabad High Court in CrI. Rev. No. 184/98.

A.K. Kaul, Ms. B. Sunita Rao for Ms. Sushma Suri for the Appellant.

Sushil Kumar, Sanjoy Kumar Ghosh and Avijit Bhattacharjee for the Respondent.

The Judgment of the Court was delivered by

SETHI, J. Leave granted.

The respondent, who was a constable in Indo-Tibetan Border Police, was found over-drunk on 26th November, 1992 and absent at the time of the roll-call. It was alleged that under the influence of liquor he entered the house of Commandant of the Battalion and thus committed the offence punishable under Section 16(2) of the Central Reserve Police Force Act, 1949 (hereinafter called "the Act"), by which he was admittedly governed. Upon trial, the Commandant of the Battalion who was also having the powers of the Magistrate

A of First Class convicted the respondent under Section 10(n) of the Act and sentenced him to imprisonment for a period of three months. Aggrieved by the order of conviction and sentence, the respondent filed an appeal which was disposed of by the Additional Sessions Judge, XII, Bareilly upholding his conviction but modifying the sentence to the extent of till the rising of the court. The appellate court further directed that "this order shall not adversely affect the service career of the accused".

B Aggrieved by the order of the appellate court, the appellant herein filed revision petition in the High Court submitting that the learned Sessions Judge could not have passed the order directing that the conviction and sentence awarded to the respondent would not affect his service career, as after conviction and sentence, it was for the appellate authorities to take or not to take any appropriate consequential action but the criminal court had no powers to issue the impugned directions. Relying upon Clause (e) of Section 386 of the Code of Criminal Procedure (hereinafter referred to as "the Code") the High Court held that the appellate court had the power to pass the impugned order. Not satisfied with the order of the High Court, the present appeal has been filed mainly on the ground that the appellate as well as the revisional court had no jurisdiction to direct that the conviction and sentence awarded to the respondent would not adversely affect his service career. It is contended that the provisions of Section 386 of the Code have wrongly been applied by the High Court vide the judgment impugned.

E Section 386 of the Code provides :

F "386. Powers of the Appellate Court-After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-

G (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law,

(b) in an appeal from a conviction-

H (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a court of competent

jurisdiction subordinate to such Appellate Court or committed for trial. or **A**

(ii) alter the finding, maintaining, the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence but not so as to enhance the same; **B**

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court competent to try the offence, or **C**

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same; **D**

(d) in an appeal from any other, order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: **E**

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal." **F**

Clause (e) empowers the Court to make any amendment or pass any consequential or incidental order that may be just or proper. The powers of the court under this Section are subject to the other provisions of law. Orders contemplated under clause (e) for amendment of the impugned order or consequential or incidental orders are only such orders which are permissible under the Code or any other law in force. Such a power does not confer a jurisdiction upon the appellate court to pass orders which tend to interfere with the service career of the convict. Amendment of the order means amendment of the main order and does not empower the court to pass an order which affects the rights of a party not before it. Incidental or **G**
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A consequential orders are such orders which are permissible under law and likely to follow as a result of the main order. The consequential or incidental orders contemplated under clause (e) of Section 386 of the Code are orders which follow as a matter of course being necessary compliments to the main orders without which the latter would be incomplete and ineffective, such as issuance of directions for refund of fine realised from accused ultimately acquitted or on the reversal of acquittal any direction as to punishment, fine or compensation payable under Section 250 of the Code and the like. The High Court, therefore, committed a mistake of law by clothing the order of the appellate court to be an order passed in terms of Section 386 of the Code. We are of the opinion that after passing the order of conviction and sentence, the criminal court should not have issued any direction relating to the service career of the respondent which is governed by the Act, Rules made thereunder and the service rules governing his conditions of service. In this way the judgment of the High Court being not sustainable is liable to be set aside.

Conceding that the appellate court or the High Court had no jurisdiction to pass the impugned order in terms of Section 386 of the Code, Shri Sushil Kumar, learned Senior Counsel appearing for the respondent submitted that the impugned order may be treated to have been passed under the Probation of Offenders Act, 1958. He vehemently argued that the circumstances existed which justified the exercise of powers under Section 3 of the Probation of Offenders Act. In view of the peculiar circumstances of the case we have opted to consider the submission made on behalf of the respondent and dispose of the same in this appeal.

Probation of Offenders Act has been enacted in view of the increasing emphasis on the reformation and rehabilitation of the Offenders as a useful and self-reliant members of society without subjecting them to deleterious effects of jail life. The Act empowers the Court to release on probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life or for the description mentioned in Sections 3 and 4 of the said Act.

Section 3 of the Probation of Offenders Act provides:

“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. A B

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.” C

It is not disputed that for an offence punishable under Section 10 of the Act, the sentence provided is one year with fine entitling the respondent to claim the benefit of Section 3 of the Probation of Offenders Act. It transpires that both the appellate as well as the High Court, after passing the order of conviction and sentence and having regard to the circumstances of the case including the nature of the offence and character of the offender, thought it expedient to take a lenient view and instead of sending him to jail opted to pass a sentence till the rising of the court. On the point of sentence, the appellate court observed: D E

“I think it justified to consider leniently because the accused Sanjay Binjola is a young boy and he just took excessive liquor on the alleged liquor day. It is also to be kept in mind that in the para Military forces liquor is provided comparatively cheaper to the para military personnels, hence I find that the punishment given to the accused for sentences of 3 months is severe consequently, I reach at the conclusion that the sentence awarded by the lower court is modified accordingly.” F

and in this context directed that the order of conviction and sentence would not adversely affect the service career of the accused. It is true that nobody can claim the benefit of Sections 3 and 4 of the Probation of Offenders Act as a matter of right and the court has to pass appropriate orders in the facts and circumstances of each case having regard to the nature of the offence, its general effect on the society and the character of the offender, etc. There are laws which specifically direct that the provisions of Probation of Offenders Act shall not apply to the persons convicted for those offences and there H

- A may be cases under other laws as well which may not justify the exercise of the powers of Probation of Offenders Act. Even apart from such exclusions the courts should be wary of extending the benefit of Probation of Offenders Act to offences relating to corruption, narcotic drugs, etc. This Court has indicated in *Dalbir Singh v. State of Haryana*, [2000] 5 SCC 82 that benefit of Probation of Offenders Act should not normally be afforded in respect of
- B the offences under Section 304A IPC when it involves rash or negligent driving. Those are instances for showing how the nature of the offence could dissuade the court to give the benefit. However, in a case of a trivial nature as the respondent is stated to have committed and keeping in view its peculiar circumstances, we find it to be a fit case where powers under Section 3 of
- C the Probation of Offenders Act can be exercised.

- While allowing the appeal and setting aside the impugned order we direct that despite confirmation of conviction by the learned Sessions Judge, the respondent be given the benefit of Probation of Offenders Act. Instead of sentencing him to any punishment, we direct the respondent to be released
- D on his entering into a bond with two sureties, to appear and receive the sentence when called upon during the period of two years and in the meantime to keep the peace and be of good behaviour. The respondent shall furnish the bond and the sureties before the Trial Magistrate within a period of two months from today. We further hold respondent entitled to the benefit of
- E Section 12 of the Probation of Offenders Act.

T.N.A.

Appeal allowed.