

GULZAR
v.
STATE OF M.P.

A

JANUARY 4, 2007

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

B

Penal Code, 1860—s. 379—Theft—Recovery of stolen articles from the accused—Possession thereof not explained sufficiently—Held: Accused guilty of the offence.

C

Probation of Offenders Act, 1958—ss. 3 and 4—Applicability of the provisions vis-a-vis s. 360 Cr.P.C—Held: Where the provisions of 1958 Act are applicable, employment of s. 360 CPC is not to be made by virtue of General Clauses Act—Code of Criminal Procedure, 1973—s. 360—General Clauses Act, 1897—s. 8(1).

D

Appellant accused was prosecuted for stealing an attache containing about Rs. 55000 from the possession of the complainant. Attache recovered from the accused was identified. The source of Rs. 55000, the possession of which was established, was not explained by the accused. The courts below on the basis of recovery of the amount and the attache, convicted the accused under Section 379 IPC.

E

In appeal to this Court appellant contended that evidence was not sufficient to come to a conclusion about commission of offence under Section 379 IPC; and that the effect of Sections 3 and 4 of Probation of Offenders Act, 1958 in the background of provision of Section 360 Cr.P.C. has not been kept in view.

F

Partly allowing the appeal and remitting the matter to High Court, the Court

G

HELD: 1. There is no infirmity in the conclusion arrived at by the courts below in analyzing the evidence to fasten the guilt on the accused. Prosecution witness had identified the attache which was recovered from the possession of the accused. Explanation was offered about the source of money and the same was found to be wholly unacceptable. The source of the

H

A sum, the possession of which was established, was not explained.
[Paras 9 and 8] [84-F-G]

B 2.1. Where the provisions of Probation of Offenders Act, 1958 are applicable, the employment of Section 360 Cr.P.C. is not to be made. Section 360 Cr.P.C. relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of Probation of Offenders Act (P.O.Act.) is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 Cr.P.C. does not provide for any role for Probation Officers in assisting the Courts in relation to supervision and other matters while P.O. Act does make such a provision. While Section 12 of the P.O. Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the P.O. Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Cr.P.C. does not contain parallel provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anomalous results. The intention to retain the provisions of Section 360 Cr.P.C. and the provisions of the P.O. Act as applicable at the same time in a given area cannot be gathered from the provisions of Section 360 or any other provision of Cr.P.C. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force, the provisions of Section 360 Cr.P.C. are wholly inapplicable. [Paras 11 and 12] [84-H, 85-C-G]

F 2.2. Enforcement of Probation Act in some particular area excludes the applicability of the provisions of Sections 360, 361 Cr.P.C. in that area.
[Para 13] [85-G]

G 2.3. The matter is remitted to the High Court to consider whether the benefits under the P.O. Act or Section 360 Cr.P.C. can be extended to the appellant. [Para 15] [86-D-E]

H CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 7 of 2007.

From the Final Judgment and Order dated 25.11.2005 of the High Court of Madhya Pradesh, Indore Bench, Indore in Criminal Revision No. 170/2000.

S.K. Gambhir, Ram Ekbal Roy, Harshvardhan Jha and M.P. Jha for the Appellant.

Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. : 1. Leave granted.

2. Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Madhya Pradesh High Court, Indore Bench. The appellant was found guilty of offence punishable under Section 379 of the Indian Penal Code, 1860 (in short the 'IPC') and was sentenced to undergo rigorous imprisonment for three years for stealing an attache containing about Rs. 55,000 from the possession of the complainant Vinod Kumar Aggarwal while he was travelling in a bus and had got down leaving this attache behind.

3. The trial court had found the accused guilty. The appeal filed before the first appellate authority was dismissed and so was the revision petition by the impugned judgment.

4. Background facts in a nutshell are as follows:

Complainant Vinod Kumar Aggrawal lodged report at the Police Post Bakaner on 25.12.1992 at about 7.30 p.m. that he had come to Manawar, Bakaner, Singhana, Gandhwani for recovery of due money from the merchants of the tea leaves supplied by him. In the morning, he had received money from Sugam Kirana and Gani Mohammad etc. in Bakaner and after recovery of money from Singhana Gandhwani had come to Manawar and also recovered the money from the parties in Manawar and took seat in the Manawar - Dhamnood Bakshi Bus at 6.30 p.m. in the evening. He had kept one attache containing Rs.50-60 thousands of all denominations inside by his side. On arrival at Bakaner, he went to meet Kailash Rathore for five minutes. When he returned back he did not find his attache. Someone had stolen about Rs.50-60 thousand alongwith the attache. Two receipt books

A in the name of the shop Atul & Shyam, tea leaves sample, one diary and one blue colour muffler were also lying in the said attache. On the basis of this report of the complainant, an FIR bearing No. 8/60 was registered with Police Post Bakaner and thereafter the Main Crime No. 717/92 was registered with the Police Station Manawar and investigation was started. On completion of investigation, charge sheet was submitted against the accused in the Court.

5. The Courts below on consideration of the material on record convicted the accused. Emphasis was laid on the recovery of the amount and the attache. Though a plea was taken that father of the accused had given the money, he could not establish his capacity to give the money to the accused. The sources indicated were found to be totally unacceptable.

6. Learned counsel for the appellant submitted that there was no proper identification of the so called attache which was stolen. In any event the evidence is not sufficient to come to a conclusion about commission of offence punishable under Section 379 IPC. Additionally it was submitted that the effect of Sections 3 and 4 of the Probation of Offenders Act, 1958 (in short the 'P.O. Act') in the background of what is stated in Section 360 of the Code of Criminal Procedure, 1973 (in short the 'Code') has not been kept in view.

7. Learned counsel for the respondent on the other hand supported the judgment of the courts below.

8. We find that the evidence of PW 9 is clear and cogent. He had identified the attache which was recovered from the possession of the accused. Explanation was offered about the source of money and the same was found to be wholly unacceptable. The source of the sum of about Rs.55,000 the possession of which was established was not explained.

9. We do not find any infirmity in the conclusion arrived at by the courts below in analyzing the evidence to fasten the guilt on the accused.

10. The residual question is applicability of Sections 3 and 4 of the P.O. Act and Section 360 of the Code.

11. Where the provisions of the P.O. Act are applicable the employment of Section 360 of the Code is not to be made. In cases of such application,

it would be an illegality resulting in highly undesirable consequences, which the legislature, who gave birth to the P.O. Act and the Code wanted to obviate. Yet the legislature in its wisdom has obliged the Court under Section 361 of the Code to apply one of the other beneficial provisions; be it Section 360 of the Code or the provisions of the P.O. Act. It is only by providing special reasons that their applicability can be withheld by the Court. The comparative elevation of the provisions of the P.O. Act are further noticed in sub-section (10) of Section 360 of the Code which makes it clear that nothing in the said Section shall affect the provisions of the P.O. Act. Those provisions have a paramountcy of their own in the respective areas where they are applicable.

12. Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the P.O. Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for Probation Officers in assisting the Courts in relation to supervision and other matters while P.O. Act does make such a provision. While Section 12 of the P.O. Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the P.O. Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain parallel provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anomalous results. The intention to retain the provisions of Section 360 of the Code and the provisions of the P.O. Act as applicable at the same time in a given area cannot be gathered from the provisions of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force, the provisions of Section 360 of the Code are wholly inapplicable.

13. Enforcement of Probation Act in some particular area excludes the applicability of the provisions of Sections 360, 361 of the Code in that area.

14. Section 3 of the P.O. Act refers particularly to Section 379 IPC. Same reads as follows:

A “3.-*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
B section 404 or section 420 of the Indian Penal Code 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
C 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.

D *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.”

E 15. In the aforesaid background, we think it appropriate to remit the
matter to the High Court to consider whether the benefits under the P.O. Act
or Section 360 of the Code can be extended to the appellant. We make it
clear that we have not expressed any opinion in that regard.

The appeal is allowed to the aforesaid extent.

K.K.T.

Appeal partly allowed.