

# ALLAHABAD HIGH COURT

State

Vs.

Sheo Shanker

Criminal Ref. No. 83 of 1953. made by S.J. Ghazipur  
(Desai and V.D. Bhargava, JJ.)

24.02.1953. 25.08.1955

## JUDGMENT

**Desai, J.**

1. This is a reference by the Sessions Judge of Ghazipur recommending that an order passed by a Judicial Officer be set aside and that the opposite party be awarded such sentence as this Court may consider proper.

2. There is no controversy about the facts which are that the opposite party Sheo Shankar Lal misappropriated an amount of Rs. 15/5/11 in his capacity as Sajawal. He pleaded guilty to the charge under Section 409, Indian Penal Code, and also refunded the misappropriated amount. He has been convicted by the Judicial Officer under Section 409, Indian Penal Code, but on account of his being a young man of 18 years of age he has been released on probation under Section 4, U.P. First Offenders 'Probation Act. The learned Sessions Judge, on being moved by the District Magistrate, has referred the case to this Court with the recommendation that the order passed by the learned Magistrate under Section 4, U.P. First Offenders 'Probation Act be set aside and that the opposite party be sentenced under Section 409, Indian Penal Code.

3. Section 4 (1), U.P. First Offenders 'Probation Act lays down that "when a person is convicted of an offence not punishable with death or transportation for life", he may be released on probation of good conduct in certain circumstances. The learned Magistrate interpreted the words "punishable with death or transportation for life" to mean "punishable with death or in the alternative with transportation for life".

According to this interpretation a person convicted of an offence cannot be released on probation only if death and transportation for life are the two alternative punishments provided for it. In other words he can be released on probation if the offence is punishable with,-

1. death only or
2. transportation for life only or
3. death and any other punishment or

4. transportation for life and any other punishment or
5. death and in the alternative any other punishment except transportation for life or

6. Transportation for life and in the alternative any other punishment except death, Since the offence of Section 409, Indian Penal Code, is punishable with transportation for life or imprisonment and fine, the learned Magistrate thought that the opposite party could be released on probation, The interpretation placed by the learned Magistrate is erroneous. The plain meaning of the words "an offence not punishable with death or transportation for life" is "an offence not punishable with death or an offence not punishable with transportation for life". Death or transportation for life must not be a punishment that can be legally inflicted for the offence; if death can be inflicted or if transportation for life can be inflicted, it is not "an offence not punishable with death or transportation for life" regardless of whether any other punishment can be inflicted either to the alternative or in addition to the punishment of death or transportation for life, as the case may be. The word 'or' does not mean that the two punishments are in the alternative; there is no justification whatsoever for interpreting the provision to mean that death and transportation for life must be the two alternative punishments provided for the offence in order to exclude it from the benefit of Section 4 of the Act. To do so one would have to add words in the section which is beyond the court's jurisdiction. The intention of the legislature obviously is not to release on probation persons convicted of serious offences. There are several criteria for deciding which are serious offences and which are not, but one of the criteria selected by the legislature for certain purposes is to treat as serious all offences for which a sentence of death can be passed or a sentence of transportation for life can be passed, whether as the sole punishment or as a punishment in addition to, or in lieu of, another punishment. The seriousness of an offence is to be judged from highest punishment that can be inflicted for it, and it is not at all dependent upon whether some additional or alternative punishment is also provided for it or not. An offence for which death can be inflicted and an offence for which transportation for life can be inflicted are both serious offences according to this criterion regardless of whether or not another punishment also is prescribed, either in addition to, or as an alternative to, death or transportation for life.

4. A person accused of a non-bailable offence may be released on bail, but the legislature does not permit him to be released on bail if he is guilty of a serious offence. So it has provided in Section 497 of the Code that if he is charged with an offence "punishable with death or transportation for life", he cannot be released on bail by a Magistrate. The words "punishable with death or transportation for life" in this provision have been interpreted to mean "punishable with death or punishable with transportation for life" in - *'Emperor v. Nga San Htwa'*, and - *'Naranji Premji v. Emperor'*, The words in the First Offenders' Probation Act should be interpreted in the same manner as the words in Section 497; both have been used by the legislature obviously with the same intention. Section 29-B, Criminal Procedure Code contains a special provision for trial of juveniles, but it is not applicable if the juvenile is charged with an offence "punishable with death or transportation for life".

<sup>1</sup> AIR 1927 Rang 205

<sup>2</sup> AIR 1928 Bom 244

Evidently the legislature thought that offences which are punishable with death and offences punishable with transportation for life are serious offences and a juvenile charged with such offences must be tried like an adult.

5. The different punishments that can be inflicted by courts are mentioned in Section 53, Penal Code. Death is one punishment and transportation another, but there is no such composite punishment as "death or transportation". Therefore, an offence punishable with death or transportation for life must mean an offence punishable with death or an offence punishable with transportation for life. An offence for which death can be inflicted and an offence for which transportation for life can be inflicted are both offences "punishable with death or transportation for life" regardless of whether another punishment can or cannot be inflicted either in addition or in substitution.

6. We are supported in the view we take by a number of authorities, for instance, - '*Public Prosecutor, Madras v. Paneswara Rao*<sup>3</sup>' '*Emperor v. Bakesha*<sup>4</sup>', - '*Emperor v. Bahawali*<sup>5</sup>' - '*Emperor v. Mst. Janki*<sup>6</sup>', and - '*Emperor v. Rahmat Khan*<sup>7</sup>',

7. The interpretation placed by the learned Magistrate not only strains the language but also would cause anomalies. To say that only a person convicted of an offence punishable with death or in the alternative with transportation for life according to the court's discretion, cannot be released on probation would mean that, persons guilty of more serious offences can be released on probation. A person guilty of offence of Section 303, Indian Penal Code must be punished with death; since there is no alternative punishment of transportation for life provided for it, according to the learned Magistrate's interpretation, he is not guilty of an offence punishable with death or transportation for life and can be released on probation. It would be absurd if a person guilty of murder cannot be released on probation but a person guilty of an aggravated form of murder could be released on probation. Had it been the intention of the legislature to exclude from the scope of Section 4, First Offenders Probation Act only such offences as are punishable with death or in the alternative with transportation for life, it would not have used the words "punishable with death or transportation for life"; it would have been sufficient to use the words "punishable with death". The offence of Section 132 (abetment of mutiny) is punishable with death or transportation for life or imprisonment. Since there are three alternative punishments, the offence cannot be said to be one punishable with death or transportation for the in the alternative and there would be nothing more absurd than releasing on probation a person guilty of abetment of mutiny which has been committed in consequence thereof. Offences of Sections 396 and 194, Indian Penal Code also are punishable with death or transportation for life or imprisonment and persons guilty of these offences also would be eligible for release on probation. Death and transportation for life are the alternative punishments only for the offences of Sections 121 and 302, Indian Penal Code, and we do not at all think that there were the only two offences meant to be excluded from the benefit of Section 4, First Offenders 'Probation Act.

There was no reason for the legislature to consider only

<sup>3</sup>AIR 1946 Mad 173      <sup>5</sup> AIR 1928 Lah 920      <sup>7</sup> AIR 1927 Lah 735 (1)

<sup>4</sup> AIR 1934 Lah 131      <sup>6</sup> AIR 1932 Nag 130

these offences as serious to which the benefit of release on probation could not be extended.

8. We agree with the learned Sessions Judge that the opposite party could not be released or probation of good conduct, and that the learned Magistrate has illegally released him. The order of release is, therefore, set aside. The opposite party was convicted on 13-5-1952. He had embezzled only a small amount of money. He was a youth and he readily confessed his guilt. In these circumstances we do not think that we should send him to jail, but he must be sentenced to imprisonment. We, therefore, sentence him to imprisonment till the rising of the court.

9. Before we take leave of the case we would like to make a few observations. One is that the order passed by the learned Magistrate is not in accordance with the provision of Section 4(1) at all. The learned Magistrate ought to have, ordered the opposite party to be of good behavior and to keep the peace during the period of probation. Further he ought not to have laid down that he would be called upon to receive severe punishment if he repeated the offence; he had no jurisdiction to pass such an order.

He should have confined himself to the order that he was required to pass under Section 4 and ought not to have gone out of his way to pass an arbitrary order. Secondly, he was quite wrong in challenging the opinion of the learned Sessions Judge in his referring order. He was called; upon to explain and not to enter into an argument with the learned Sessions Judge. It was not for him to show that the referring order of the learned Sessions Judge was wrong. His duty was to take it as correct and to offer an explanation, if he so desired, without questioning the correctness of propriety of it. It was for this Court only to decide whether the referring order was correct or proper.

Reference accepted.