

ELIAMMA & ANR.

v.

STATE OF KARNATAKA
(Criminal Appeal No. 265 of 2009)

FEBRUARY 11, 2009

**[DR. ARIJIT PASAYAT, DR. MUKUNDAKAM SHARMA
AND H.L. DATTU, JJ.]**

CODE OF CRIMINAL PROCEDURE, 1973:

s. 360 – Release of accused on probation – Convicted u/ss 304 (part II) and 201/34 IPC – Plea for release of accused u/s 360 of the Code – HELD: Effect, relevance and applicability of s. 360 not considered by courts below – Matter remitted to trial court for consideration if benefit of s. 360 can be extended to accused – Penal Code, 1860 – ss. 304 (part II) and 201/34.

In the instant appeal arising out of the conviction u/ ss 304 (part II) and 201/34, the accused-appellants, while challenging the conviction on merits, alternatively pleaded that they were entitled to the benefit of s. 360 of the Code of Criminal Procedure, 1973.

Allowing the appeal in part, the Court

HELD: The effect, relevance and applicability of Section 360 Cr.P.C. have not been considered by the courts below. Therefore, while upholding the conviction, the matter is remitted to the trial court for the limited purpose of deciding whether the benefit u/s 360 Cr.P.C. can be extended to the accused-appellants. [Para 8 and 10] [140-G; 142-C]

Chandreshwar Sharma v. State of Bihar 2000(9) SCC 245, relied on.

A **Case Law Reference:**

2000(9) SCC 245 relied on para 9

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B From the Judgment and Order dated 22.2.2006 of the High
Court of Karnataka at Bangalore in Criminal Application No.
1035 of 1999.

C Altaf Ahmed, S.N. Bhat and Deepa Mahajan for the
Appellant.

Sanjay R. Hegde, A. Rohen Singh, Amit Kr. Chawla and
Vikrant Yadhav for the Respondent.

D The Judgment of the Court was delivered by

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

E 2. Challenge in this appeal is to the judgment of a learned
Single Judge of the Karnataka High Court dismissing the
appeal filed by the appellants. Both the appellants faced trial
for alleged commission of offences punishable under Sections
302, 201 read with Section 34 of the Indian Penal Code,
1860(in short the 'IPC'). Learned Third Additional Sessions
judge D.K. at Mangalore in Sessions Case No. 94 of 1995 held
F that the accused persons were to be convicted in terms of
Section 304 Part II and Section 201 read with Section 34 IPC,
so far as appellant No.1 is concerned and Section 201 read
with Section 34 IPC so far as appellant No.2 is concerned.

G 3. Background facts giving rise to the trial are as follows:

H M.T. George (hereinafter referred to as the 'deceased')
was addicted to alcohol and used to assault A1. A1 had
become desperate with the bad conduct of the deceased. On
6.3.1995 at 9.30 p.m. the deceased picked up quarrel,

assaulted A1 and tried to pull her sari. A2 and A3 were present. Because of the ghastly conduct of the deceased, A1 dealt a blow with the iron rod on the head of the deceased which resulted in his death. The accused persons stealthily buried the body in the backyard of the house. A1 in the early morning of 7.3.1995 informed school teacher (PW 1) of the village that the deceased quarrelled with her and tried to pull her sari. Therefore, she hit the deceased on his head and that he was unwell. PW1 heard the fact from A1 and went away. In the evening PW1 met A2 and made enquiries about the health of the deceased. A2 informed that his father was dead and that they buried the body in the backyard. PW1 suspected foul play and lodged FIR before the police. At the instance of A1 and A2 the dead body buried in the backyard was exhumed on 8.3.1995 in the presence of T.E.M.

The prosecution relied on the extra judicial confession made by A1 before PW 1 and the circumstances of recovery of the dead body at the instance of both the accused persons proved their guilt. An appeal was preferred before the High Court which by the impugned judgment held that actual conviction should have been in terms of Section 304 Part I IPC. But in the absence of challenge by the State there was no scope for interference. The evidence of PW 1 was found to be credible. The appeal was dismissed.

4. Though in support of the appeal learned counsel for the appellant submitted that the High Court ought to have accepted the stand that PW1's evidence is not without blemish, the same is clearly without substance. The evidence of PW 1 has been analysed by both the trial court and the High Court and have been found to be cogent and credible. The alternative plea of learned counsel for the appellant was that neither the trial court nor the High Court considered the effect of provisions of Section 360 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.').

5. Learned counsel for the respondent-State on the other

A hand supported the judgment.

6. It appears that the trial court convicted A1 under Section 304 Part II IPC and Section 201 read with Section 34 IPC and sentenced him to undergo rigorous imprisonment for four years and one year respectively. So far as A2 is concerned he was convicted under Section 201 read with Section 34 and was sentenced to undergo imprisonment for one year. The other co-accused was convicted by the juvenile court.

7. Section 360 Cr.P.C. reads as follows:

"360. Order to release on probation of good conduct or after admonition :—(1) When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, Character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that, where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding

the accused to, or taking bail for his appearance before such Magistrate, who shall dispose of the case in the manner provided by sub-section (2). A

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken. B C

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years, imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition. D E

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision. F

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu, thereof pass sentence on such offender according to law: G

A Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

B (6) The provisions of Sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

C (7) The Court before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

D (8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognisance, it may issue a warrant for his apprehension.

E (9) An offender, when apprehended on any such warrant shall be brought forthwith before the Court issuing warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and Court may, after hearing the case, pass sentence.

F (10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1951), the Children Act, 1960 (60 of 1960) or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.”

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8. It is rightly contended by the learned counsel for the appellant that the effect, relevance and applicability of Section 360 Cr.P.C. have not been considered by the courts below.

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9. In *Chandreshwar Sharma v. State of Bihar* [2000(9) SCC 245] it was observed as follows: A

"The appellant herein was convicted under Sections 379 and 411 IPC and was sentenced to rigorous imprisonment for one year as 3.5 kg of non-ferrous metal was recovered from his possession. On an appeal being filed, the conviction under Section 379 was affirmed. The appellant carried the matter in revision, but the revision also stood dismissed. All along the case of the appellant was that the recovery from the tiffin carrier kept on the cycle would not tantamount to recovery from the possession of the appellant, and this contention has been negated and rightly so. When the matter was listed before this Court, a limited notice was issued as to why the provisions of Section 360 of the Criminal Procedure Code should not be made applicable. Pursuant to the said notice, Mr. Singh, the learned Standing Counsel for the State of Bihar has entered appearance. From the perusal of the judgment of the learned Magistrate as well as the court of appeal, and that of the High Court, it transpires that none of the forums below had considered the question of applicability of Section 360 of the Code of Criminal Procedure. Section 361 and Section 360 of the Code on being read together would indicate that in any case where the court could have dealt with an accused under Section 360 of the Code, and yet does not want to grant the benefit of the said provision then it shall record in its judgment specific reasons for not having done so. This has apparently not been done, inasmuch as the Court overlooked the provisions of Sections 360 and 361 of the Code of Criminal Procedure. As such, the mandatory duty cast on the Magistrate has not been performed. Looking to the facts and circumstances of the present case, we see no reason not to apply the provisions of Section 360 of the Code of Criminal Procedure. We accordingly, while maintaining the conviction of the appellant, direct that he B
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A will be dealt with under Section 360, and as such, we direct
that the appellant be released on probation of good
conduct instead of sentencing him, and he should enter into
a bond with one surety to appear and receive the sentence
when called upon during the period of one year for the
purpose in question. The bond for a year shall be executed
B before the learned Chief Judicial Magistrate, Ranchi, within
3 weeks from today. The appeal is disposed of
accordingly."

C 10. Therefore, while upholding the conviction, we remit the
matter to the trial court for limited purpose for deciding whether
the benefit under Section 360 Cr.P.C. can be extended to the
appellants.

D 11. In view of the above the appeal is allowed to the extent
indicated.

R.P.

Appeal partly allowed.