

Ashok Kumar Moharana Vs. State

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Court : Orissa

Decided On : Aug-04-1994

Reported in : 1995CriLJ207; 1994(II)OLR512

Judge : A. Pasayat, J.

Acts : [Probation of Offenders Act, 1958](#) - Sections 6 and 11; Railway Property (Unlawful Possession) Act, 1966 - Sections 3

Appeal No. : Criminal Revision No. 473 of 1990

Appellant : Ashok Kumar Moharana

Respondent : State

Advocate for Def. : B. Das, Addl. Standing Counsel

Advocate for Pet/Ap. : S. Ch. Sahu, S.K. Nayak and S.K. Sahu

Judgement :

A. Pasayat, J.

1. Petitioner calls in question legality of his conviction for an offence punishable Under Section 3(a) of Railway Property (Unlawful Possession) Act, 1966 On short, 'Railway Property Act'). Petitioner was found guilty by learned Judicial Magistrate, First Class, Khurda and sentenced to undergo rigorous imprisonment for one year

and to pay a fine of Rs. 1000/- with default sentence of three months' rigorous imprisonment. In appeal, conviction and sentence were maintained.

2. Though in the revision application several points were urged to label conclusion of Courts below to be erroneous Mr. S.K. Sahu learned counsel restricted the challenge to one point, which acceptedly was not raised before Courts below. According to him, prescriptions of Section 6 of the [Probation of Offenders Act, 1958](#) (in short, the 'Act') was not kept in view by the Courts below Learned counsel for State submitted that this is a factual controversy as age of the offender is the determinative factor, while dealing with a case where applicability of Section 6 of the Act is in issue.

3. From the records I find that age of petitioner at the time of commission of offence was accepted by prosecution to be less than 21 years. Applicability of Section 6 can be raised for the first time in appeal or revision where there is no dispute regarding age of the accused at the time of commission of offence, since it is essentially a question of law. The age of the accused however should be undisputedly below the prescribed limit. The inhibition on power to impose sentence of imprisonment applies not only at the stage of trial but also at a subsequent stage as evident from Sub-section (1) of Section 11 of the Act. It is evident from the use of the expression 'High Court or any other Court when the case comes before it on appeal or in revision' in the said provision. It is therefore, obvious even though point relating to applicability of Section 6 was not raised before Courts below, it can be raised before appellate or revisional Court, as the case may be, Similar view was expressed in Mohammad Aziz Mohammad Nasir v. State of Maharashtra, AIR 1976 SC 730.

4. Section 6 of the Act is in nature of an injunction as distinct from a discretion Under Section 3 of the Act which authorises a Court not to impose a sentence of imprisonment on a person who is accused of committing an offence. Where a person is under 21 years of age at the time of commission of an offence, has been found guilty, and the offence committed is punishable with imprisonment otherwise than that of life. Court is obligated to act in terms of Section 6 unless it is satisfied that it would not be desirable to deal with accused Under Section 3 or 4 of the Act,

5. Section 6 of the Act mandates a report from the Probation Officer which has to be considered for opinion of Court regarding non- desirability of extending provision of Section 3 or 4 to the accused. In case of offender under age of 21 years on the date of commission of offence. Court is expected ordinarily to give benefit of provisions of the Act. The only embargo on the power is sentence awardable, and view of the Court that having regard to the circumstances of the case including nature of offence and character of the offender, a departure is warranted. Reasons for making a departure and awarding of sentence are to be recorded. Considerations which are relevant to the application of these aspects are, circumstances of the case, nature of offence and character of the offender. These three aspects are to be kept in view while deciding whether accused should be granted benefit of provisions of the Act. Similar view was expressed by apex Court in Manarullah v. State of Tamil Nadu AIR 1983 SC 654. An inbuilt safeguard is provided in Sub-section (2) of Section 6 that when the Court is considering the third aspect i. e. character of offender, then before the Court forms its opinion adverse to the offender in that regard, it must seek a report from a Probation Officer or get any other information available relating to the character and physical and mental condition of the offender. Provision of the Act intends amongst others reformation of juvenile offenders so as to prevent them becoming hardened criminals Educative and reformatory treatment is intended by operation of Sec 6. Provisions of Section 6 are mandatory and Court is obligated to consider applicability of provision of the Act in the manner as indicated above.

6. In the case at hand, learned JMFC has not considered applicability of Section 6 of the Act. He shall after getting a report from Probation Officer as required under Sub-section (2) of Section 6 and keeping in view three aspects enumerated above, take a decision whether protections of Section 6 are to be afforded to the petitioner, after giving him an opportunity of being heard. If the petitioner wants to address the Court on any of the three aspects indicated, the Court shall permit him to do so before taking a final decision in the matter.

Criminal Revision is disposed of.