Supreme Court of India
Ramji Missir And Another vs The State Of Bihar on 6 December, 1962
Equivalent citations: 1963 AIR 1088, 1963 SCR Supl. (2) 745
Author: N R Ayyangar
Bench: Ayyangar, N. Rajagopala

PETITIONER:
RAMJI MISSIR AND ANOTHER

Vs.

RESPONDENT:
THE STATE OF BIHAR

DATE OF JUDGMENT:
06/12/1962

BENCH:
AYYANGAR, N. RAJAGOPALA
BENCH:
AYYANGAR, N. RAJAGOPALA
IMAM, SYED JAFFER
SUBBARAO, K.
MUDHOLKAR, J.R.

CITATION:
1963 AIR 1088 1963 SCR Supl. (2) 745
CITATOR INFO :
F 1965 SC 444 (7,24,25)
F 1965 SC 843 (11)
RF 1972 SC1295 (9)
R 1972 SC2434 (5)
RF 1973 SC 780 (6)

ACT:
Probation of Offenders-Age of offender-Applicability of Act-Discretion of High Court-Probation of Offenders Act, 1958 (20 of 1958), ss. 3, 4, 6, 11.

HEADNOTE:
The appellants, R and B, who were brothers, were pro. secuted for having assaulted S who as a result suffered grievous injuries. Both the appellants were found guilty by the Assistant Sessions judge, and sentenced to various terms of imprisonment. While B was convicted under ss. 307 and 326 of the Indian Penal Code, the conviction of R was under s. 324. Section 6 (1) of the Probation of Offenders Act, 1958, enacts "When any person under twenty one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the

Court by which the person is found guilty shall not sentence him to imprisonment..... Though B was 19 years old, s. 6 (1 was inapplicable to him as he was found guilty of an offence punishable with imprisonment for life. R, the older brother was aged 2 1, but the trial judge considered it inappropriate to afford him the benefit of the section on the ground that the. act of assault Was premeditated. On appeal, the High Court set aside the convictions of B and in their place a finding of guilty under s. 324 of the Indian Penal Code was recorded for which a sentence of 2 years was imposed, and, as regards R, his conviction under s. 324 was maintained but the sentence was reduced from 2 years to 9 months. On the question of the applicability of the provisions of the Act to the accused, the High Court took the view (1) that s. 6 (1) was inapplicable to R because though lie might have been under 21 years of age an the date of the offence he was not a person under 21 years when the Sessions judge found him guilty, and (2) that though under s. 1 1 of the Act, the High Court was competent to make an order in favour of B, it was entirely discretionary for that Court to exercise the power conferred on it under that section, and that in view of the fact that the court below had already dealt with the matter, it wag not desirable to deal with the case of the appellant under the provisions of the Act at that stage.

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Held : (1) that the age referred to in s. 6 (1) of the Probation of Offenders Act, 1958, is that when the courts deal; with the offender, that being the point of time when the court has to choose between the two alternatives, whether to sentence the offender to imprisonment or to apply to him the provisions of s. 6(1) of the Act.

(2)that the courts mentioned in s. 11 of the Act, be they trial courts or courts exercising appellate or revisional jurisdiction, are empowered to exercise the jurisdiction conferred on courts not only under ss. 3 and 4 and the con. sequential provisions but also under s. 6.

(3)that the power conferred on appellate or other courts by s. 1 1 (1) of the Act is of the same nature and characteristics and subject to the same criteria and limitations as that conferred on the courts under ss. 3 and 4.

(4)that the provisions of s. 6. (1) restrict the absolute and unfettered discretion implied by the word ,may" in S. 11 (1), and the entirety of s. 6 (1) applies to guide or condition the jurisdiction of the High Court under s. 11(1).

(5)that the crucial date for reckoning the age where an appellate court modifies the judgment of the trial judge when s. 6 becomes applicable to a person only on the decision of an appellate or a revisional court, is that upon which the trial court had to deal with the offender.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 144 of 1962.

Appeal by special leave from the judgment and order dated May 10, 1962, of the Patna High Court in Criminal Appeal No. 339 of 1961.

B.K. P. Sinha and A. G. Ratnaparkhi, for the appellants. S.P. Varma, P. D. Menon and, B. N. Sachthey, for the respondent.

1962. December 6. The judgment of the Court was delivered by AYYANGAR, J.- This appeal by special leave granted by us on September 7, 1962, raises for consideration the proper construction of ss. 6 and 11 of the Probation of Offenders Act, 1958 (XX of 1958), hereinafter called the ‚Act'.

The appellants are two brothers-Ramji and Basist. It was alleged that these two assaulted one Sidhnath (P.W. 2) who as a result suffered grievous injuries Basist, the younger brother was charged before the Assistant Sessions judge, Arrah, with the commission of an offence under s. 307, Indian Penal Code, for the reason that the injury he inflicted was a bhala-blow under circumstances ""that if by that act death had been caused he would have been guilty of murder", and as the injury actually sustained was grievous he was further charged with causing grievous hurt under s. 326, Indian Penal Code. The elder brother who too caused hurt to the victim was charged under s. 324, Indian Penal Code. The Assistant Sessions.Judge held the prosecution case as alleged establish against both the accused. It is now necessary to mention that according to the Sessions judge Ramji was 21 years old and Basist 19. Section 6 of the Act enacts :

> "6. (1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circums- tances of the case including the nature of the offence and the character of the offender, would not be desirable to deal with him under section 3 or section 4, and if the Court passes any sentence of imprisonment on the offender, shall record its reasons for doing so.
>
> (2) For the purpose of satisfying itself Whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in subsection (1), the Court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender."

The terms of this section excluded the application of its provisions to Basist who was found guilty of an offence punishable with imprisonment for life (both ss. 307 and 326, Indian Penal Code). He accordingly sentenced Basist to undergo rigorous imprisonment for six years under s. 307, Indian Penal Code, and to four 'years under s. 326, Indian Penal Code, the sentences to run concurrently. As regards Ramji, the elder brother, he considered it inappropriate to afford him the benefit of this

provision and recorded his finding on this matter in these terms:

> "So far as accused Ramji is concerned I am not inclined to take recourse to the provisions of the Probation of Offenders Act, 1958, because the act of assault on the informant on the part of this accused is premeditated."

He sentenced him to undergo rigorous imprisonment for two years under s. 324, Indian Penal Code.

Both the accused filed an appeal to the High Court. The learned Single judge who heard the appeal considered the evidence in the case and the circumstances in which the injury was inflicted and held that there was no intention on the part of Basist to cause grievous hurt to P.W. 2, with the result that as against him the' conviction under s. 307 as well as that under s. 326, Indian Penal Code, were set aside and in their place he recorded a finding of guilty in respect of an offence under s. 324, Indian Penal Code, for which he imposed a sentence of rigorous imprisonment for two years. As against Ramji the conviction was maintained but being informed by counsel that that accused had been suffering from tuberculosis the sentence of imprisonment was reduced from 2 years to 9 months.

It was urged before the High Court that the reasons assigned by the Assistant Sessions judge for refusing to apply the provisions of s. 6 of the Act to accused Ramji were not proper. This submission was, however, repelled since the learned judges considered the section inapplicable to that accused because, though he might have been "under 21 Years of age" on the date of the offence (October 17, 1960), "he was not a person under 21 years of age" on May 24, 1961, when the Sessions judge found him guilty and sentenced him to a term of imprisonment, holding that the crucial date on which the age had to be determined being not the date of the offence but the date on which as a result of a finding of guilty sentence had to be passed against the accused. As regards Basist also, it was urged before the High Court that in view of the alteration in the finding recorded as regards his guilt, the beneficial provisions of s. 6 of the Act became applicable to him, the learned judge holding that he could pass the same order as the trial court could have done because of the provisions contained in s. 11 of the Act reading :

> "11. (1) Notwithstanding anything contained in the Code or any other law, an order under this Act may be made by any Court empowered to try and sentence the offender to imprisonment and also by the High Court or any other Court when the case comes before it on appeal or in revision.
>
> (2) Notwithstanding anything contained in the Code, where an order under section 3 or section 4 is made by any Court trying the offender (other than a High Court), an appeal shall lie to the Court to which appeals ordinarily lie from the sentences of the former Court. (3) In any case where any person under.

twenty. one years of age is found guilty of having committed an offence and the Court by which he is found guilty declines to deal with him under section 3 or section 4, and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any othe r law, the Court to which appeals

ordinarily lie from the sentences of the former Court may, either of its own motion or on an application made to it by the convicted person or the Probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under section 3 or section 4 in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in' lieu thereof pass sentence on such offender according to law Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the Court by which the offender was found guilty."

The learned judge however, declined to do so observing:

"No doubt, under the provisions of s. 11 of the Probation of Offenders Act this Court is competent to make an order, but it is entirely discretionary for this Court to exercise the power conferred on it under s. II. In, view of the fact that the Court below has already dealt with this matter, though not very satisfactorily, I do not consider it desirable to deal with the cases of these appellants under the provisions of the Probation of Offenders Act at this stage."

and instead, passed the sentence of imprisonment as already mentioned. It is the correctness of these orders refusing to apply the provisions of s. 6 of the Act to the cases of the appellants that is raised for consideration in this appeal.

Taking first the case of Ramji , the elder brother, we entirely agree with the High Court in their construction of s. 6. The question of the age of the person is relevant not for the purpose of determining his guilt but only for the purpose of the punishment which he-should suffer for the-offence of which he has been found, on the evidence, guilty. The object of the Act is to prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime. If this were borne in mind it would be clear that the age referred to by the opening words of s. 6(1) should be that when the court is dealing with the offender that being the point of time when the court has to choose between the two alternatives which the Act in supersession of the normal penal law vests in it, viz., sentence the offender to imprisonment or to apply to him the provisions of S. 6(1) of the Act. As the High Court has found that Ramji was not a person under the age of 21 on May 24, 1961, when. the learned Sessions judge found him guilty it is clear that s. 6(1) of the Act has no application- to him. The position in regard to the second appellant Basist--tands on an entirely different footing. He was said to be of the age of 19 by the Sessions judge which is apparently a reference to the time when the offence was committed. If so, he would have been about 20 at the time when the Sessions judge found him guilty of offences under ss. 307 and 326, Indian Penal Code, and possibly also below 21 at the time when the High Court altered his conviction into one under s. 324, Indian Penal Code. If by reason of his age, and the offence of which he was been found guilty the provisions of s. 6(1) are not excluded, the question that has next to be considered is whether the learned judge had an absolute and unfettered discretion to pass or refuse an order under 'the Act by virtue of the terms of s. 11 of the Act. This would obviously turn on (1) whether or not s. 6(1) was applicable to the High Court,

and (2) the proper construction. of the terms of s. 11 which empowers appellate and revisional courts to pass orders under the Act.

It was urged by learned Counsel for the appellant that the High Court when it recorded a finding that Basist was guilty of an offence under s. 324, Indian Penal Code, was squarely within the words "the court by which a person is found guilty" occurring in s. 6(1) as it was only by that Court that for the first time the accused was found guilty of an offence which was not excluded by the opening words of that section. Learned Counsel relied for this position on the judgment of High Court of Madras in Narayananwami Naidu v. Emperor (1) following a ,decision of the Allahabad High Court to a similar effect in Emperor v. Birch (2). The question that arose in the first of the above cases related to the scope of the words "Court before whom he is con- victed" occurring in s. 562, Code of Criminal Procedure, as it originally stood. The provision in s. 562, Code of Criminal Procedure, is somewhat in pari materia with s. 4 of the Act wherein a Person found guilty of having committed offences not punishable (1) (1906) I.L.R. 29 Mad. 567.

(2) (1902) I.L.R. 24 All. 306.

with death or imprisonment for life may, instead of being sentenced to imprisonment, be released on entering into a bond. In the Code as originally enacted which the decision referred to had to deal with, there was no express provision as regards the power of appellate courts to pass similar orders. The accused in that case was tried and convicted by a magistrate under sg. 447 and 352, Indian Penal Code, and sentenced to undergo rigorous imprisonment for two weeks. The accused filed an appeal and the Deputy Magistrate who heard it while affirming the conviction directed his release on his executing a bond applying to him the provisions contained in s. 562, Code of Criminal Procedure. The District judge considered that the Deputy Magistrate had exceeded his jurisdiction in making this order and referred the question to the High Court. The learned judges rejected the reference observing that the words ""Court before whom he is convicted' used in s.562 were not intended to limit the power of making orders under that section to the court of first instance.

It might be mentioned that the Code has since been amended by the addition of sub-s. (2) which runs :

> "An order under this section may be made by an appellate court or by the High Court when exercising its powers of revision."

so that it is no longer necessary for an appellate or revisional court to rely on any construction of the words ",'the court by which the person is found guilty" for invoking or exercising- its jurisdiction. The position therefore comes to this-the words referring to ""the court by which a per-son is found guilty" are wide enough to include an appellate court, and particularly so where it is the appellate court alone which by reason of its finding on the guilt of the accused becomes for the first time vested with the power or the duty to act under the section.

Undoubtedly if s. II were attracted to the case, then there would be no need for invoking the Jurisdiction of the High Court under s. 6, and indeed in those circumstances the proper

construction of s. 6 itself would be to exclude an appellate or revisional court since a redundancy could not have been intended by the statute.

The first question would therefore be to ascertain whether the jurisdiction or powers envisaged by s. 6(1) are within' the scope of the jurisdiction conferred by s. 11. The power conferred on the High Court is to pass ""an order under the Act." One is thrown back on the Act for determining what these are. They are:

(1)Under s. 3 a court might order the release of a person found guilty of an offence of the type specified in the section after due admonition.

(2)Under s. 4 an order may be passed in circumstances set out in it releasing such person on entering into a bond with or without sureties or pass a supervision order. (3)Orders which are consequential on orders under s. 3 or s. 4 like those for which provision is made by ss. 5 & 9. So far as s. 6 is concerned it is, to say the least, doubtful whether it. involves the "'passing of an order", for the operative words are that the court finding a person guilty refrains from passing any sentence. An injunction enacted by this Act against passing a sentence of imprisonment which the court under the normal law is empowered or enjoined to pass can hardly be termed ",passing an order" under the Act. If this were correct, the result would be that on the reasoning which the High Courts of Madras and Allahabad adopted to construe the words in s. 562, of the Code, the- High Court, when hearing an appeal, would be subject to the provisions of s. 6.

It is however possible that the words in s. 11 (1) """,pass an order under the Act" are not to be construed so strictly and literally, but to be understood to mean "to exercise the powers or Jurisdiction conferred by the Act." This wider interpretation might perhaps be justified by the scope and object of this section. Section 11 is to apply ""notwithstanding anything in the Code or any other law" to all courts empowered to sentence offenders to imprisonment. TO read a beneficial provision of this universal type in a restricted sense, so as to confine the power of these courts to the exercise of the powers under ss. 3 and 4 alone would not, in our opinion, be in accord with sound principles of statutory interpretation. We are therefore inclined to hold that the Courts mentioned in s. 11 be they trial courts or exercising appellate or revisional jurisdiction are thereby empowered to exercise the jurisdiction conferred on Courts not only under ss. 3 and 4 and the consequential provisions but also under s. 6.

Accepting therefore the interpretation of S. 11 (1) which was urged by Counsel for the respondent, that the courts mentioned in it could pass orders under ss. 3, 4 or 6, the question next to be considered relates to the incidents of that jurisdiction with regard to the amount and nature of discretion vested in these courts.

It was submitted on behalf of the appellant that the power conferred on the High Court and other courts by s. 11 (1) was neither more nor less than those of the court under s. 6 (1) and that the former were bound to exercise it, subject to the same conditions and limitations as are set out in the latter provision. Stated in other words the interpretation suggested was that the terms of s.6 had, so to speak, to be read into the jurisdiction of the courts acting under s. II (1). On the other hand the

contention urged by the respondent was that s. II (1) had to be read on its own language and so read it conferred on the courts mentioned in it, an absolute and unfettered discretion "to pass or not to pass an order under the Act" as they thought fit having regard to the circumstances of each case.

A considerable portion of the argument by the respondent was based on the import of the facultative verb "may" in the words "'may be made" occurring in the operative part of the sub-section as conferring a discretion and that as no limitations were placed' by this or any other section on the exercise of this discretion, the same should be held to be unfettered and therefore capable of being exercised, no doubt, on judicial principles but not subject to any statutory limitations. It might be mentioned that from the relevant passage of the judgment of the High Court which we have extracted, it would appear that the learned judge has proceeded on this interpretation of S. 11. Though the word "may" might connote merely an enabling or permissive power in the sense of the usual phrase ""it shall be lawful", it is also capable of being construed as referring to a compellable duty, particularly when it refers to a power conferred on a court or other judicial authority. As observed in Maxwell on Statutes "Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall' if they think fit, or '&hall have power,' or that, 'it shall be lawful' for them to do such acts, a statute appears to use the language of mere permission but it has been so often decided as to have become an axiom that in such cases such expressions may have-to, say the least-a compulsory force. The fact that the power is conferred on a Court might militate against the literal interpretation of "may" suggested by the respondent. This apart, the power conferred by s. 11(1) is to pass "'an order under the Act" and the question arises as to the precise import of these words, and in particular whether these words would not imply that the order to be passed would be subject to the same limitations or conditions as the orders under what might be termed the primary provisions of the Act. Thus s. 3 empowers a court to release certain offenders on probation of good conduct after due admonition, and it lays down certain tests as a guidance or the bases upon which that discretion is to be exercised : (1) that no previous conviction should have been proved against him, and (2) that the court by which the person is found guilty should be of the 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. Similarly, s. 4 empowers a court to release certain offenders on probation of good conduct, The criteria laid down there. and the guidance set out is that the court by which the person is found guilty should be 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 to release him, on probation of good conduct, with a proviso that the power is not to be exercised unless the court were satisfied that the offender or his surety has :a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

Would it be a proper construction of s. 11 (1) to hold that the High Court etc. could pass orders in appeal or revision without reference to these standards, tests or guidance which the statute has prescribed for the primary courts? We are clearly of the opinion that this is capable only of a negative answer and that the power conferred on appellate or other courts by s. II (1) was of the same nature and characteristics and subject to the same criteria and limitations as that conferred on

the courts under ss. 3 & 4. We are confirmed in this view by the terms of s. 11(3). If this were so it would not be possible to adopt a, different rule of interpretation when one came to consider the power under s. 6. It cannot, for instance, be suggested that the High Court could in its discretion exercise the power under s. 6 in the case of a person who is above the age of 21, nor where a person is found guilty of an offence punishable with death or imprisonment for life. These limitations on the exercise of the discretion have surely to be gathered only from the terms of s. 6(1). If s. 6(1) applies so far to restrict the absolute and unfettered discretion implied by the word "may", it appears to us that logically the conclusion is inescapable that the entirety of s. 6(1) applies to guide or condition the jurisdiction of the High Court under s. 11(1). We there. fore reject the submission made to us on behalf of the respondent that an appellate court has an unfettered discretion in dealing with a case which comes before it under s. 11 and that its discretion and powers are not to be governed by the terms of s. 6(1).

The question next to be considered is the result of applying the terms of s. 6(1) to a person in the position of Basist. It was not disputed by learned counsel for the respondent that the learned Judge of the High Court failed to consider the case of this accused with reference to the terms of s. 6 since he has proceeded on the basis that he had an unfettered discretion in the matter and which in the circumstances of the present case he was not inclined to exercise in favour of the accused. The order of the High Court in so far as it relates to the second appellant-

Basist-must therefore be set aside and the High Court directed to exercise its discretion on the basis that it was judging the matter with reference to the criteria laid down in s. 6.

We shall now proceed to consider one question which- was mooted before us in regard to the crucial date for reckoning the age where an appellate court modifies the judgment of the trial judge, when s. 6 becomes applicable to a person only on the decision of an appellate or a revisional court. Is the age of the offender to be reckoned as at the date of the judgment of the trial judge or is it the date when the accused is, for the first time, in a position to claim the benefit of s. 6. We consider that on the terms of the section, on grounds of logic as well as on the theory that the order passed by an appellate court is the correct order which the trial court should have passed, the crucial date must be that upon which the trial court had to deal with the offender. In this view as Basist was admittedly below 21 years of age at the time of the judgment of the Assistant Sessions judge, s. 6 was not inapplicable to him even assuming he was above that age by the date of the order in appeal.

The appeal is accordingly allowed in part i.e., in regard to the second appellant-Basist and is remanded to the High Court to consider the proper order to be passed in his case by applying the provisions of s. 6 of the probation of offenders Act, 1958.

Appeal allowed in part.