by the trial Magistrate. In this regard reference may be made to the observations of the Supreme Court in *Sita Ram Durga Prasad* v. *State of Madhya Pradesh* (3) wherein it was held, that in appeals against acquittal, the High Court should give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he had been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. We have gone through the statements of the witnesses and are of the view that they are not trust worthy. In our opinion, the trial Magistrate properly appreciated the evidence and rejected the prosecution version.

(11) In view of the aforesaid circumstances, it will not be proper to upset the findings of the trial Magistrate. The appeal, therefore, fails and the same is dismissed.

Bhopinder Singh Dhillon, J.—I agree.

N.K.S.

APPELLATE CRIMINAL

Before Bhopinder Singh Dhillon and K. S. Tiwana JJ.

STATE OF PUNJAB—*Appellant.*

versus

NAIB SINGH,—*Respondent.*

Criminal Appeal No. 1185 of 1974

February 21, 1978.

Indian Penal Code (XLV of 1860)—Section's 320(7), *and* 326—*Probation of Offenders Act (XX of 1958)—Sections* 4(1) *and* (2)—*'Fracture'—Meaning of—Partial cut of the skull vault—Whether a grievous injury—Such offence—Whether falls under section* 326—

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(3) A.I.R. 1975 S.C. 1977.

Report of Probation Officer not sent for—Accused—Whether can be released on probation in the absence of such report—Provisions of Section 4 (2)—Whether mandatory.

Held, that the word 'fracture' is not defined in the Indian Penal Code 1860 but it is beyond the pale of controversy that if there is a break by cutting or splintering of the bone or there is a rupture or fissure in it, it would amount to a fracture within the meaning of clause (7) of section 320 of the Code. What court has to see is whether the cuts in the bones noticed in the injury report are only superficial or do they effect a break in them. Partial cut of the skull vault is, therefore, a grievous injury and the offence falls under section 326 of the Code.

(Paras 7, 8 and 9).

Held, that the provisions of section 4(2) of the Probation of Offenders Act 1958 are mandatory. The reading of section 4 of the Act leave no doubt that if the power conferred by sub-section (1) of section 4 has to be exercised, the Magistrate has no option but to send for the report of the Probation Officer and then to take the same into consideration before deciding whether the power under sub-section (1) of section 4 of the Act should be exercised or not. Recourse taken by a trial Magistrate to the provisions of sub-section (1) of section 4 of the Act, without having called for the report of the Probation Officer thereby not duly complying with provisions of sub-section (2) of section 4, vitiates the order of probation.

(Paras 10 and 11)

Appeal from the order of Shri Manmohan Singh Ahluwalia, Judicial Magistrate Ist Class, dated the 17*th April,* 1974.

Charge:—Under section 324, *I.P.C.*

Order:—Under section 4(1) *of the Provision of Offenders Act, he shall be released on his entering into a bond in the sum of Rs.* 2000 *(Rs. two thousand), with one surety in the like amount, for a period of one year, to appear and receive sentence when called upon during the period of such bond and in the meantime to keep the peace and to be of good behaviour.*

E. H. Banerji, Advocate;—*for A. G. Punjab.*

R.P. Jagga, Advocate,—*for the complainant.*

Diali Ram Puri, Advocate with P. K. Bansal; Advocate,—*for the Respondents.*

JUDGMENT

B. S. Dhillon J.

(1) Naib Singh respondent was tried and found guilty for an offence under section 324 of the Indian Penal Code, by the learned Judicial Magistrate Ist Class, Muktsar, *vide* his judgment dated 17th April, 1974, and was ordered to be released on probation on his entering into a bond in the sum of Rs. 2,000, with one surety in the like amount, for a period of one year, to appear and receive sentence when called upon during the period of such bond and in the meantime to keep the peace and to be of good behaviour, under section 4(1) of the probation of offenders Act, 1958, (hereinafter referred to as the Act). The State of Punjab has challenged the judgment of the learned Magistrate dated the 17th April, 1974, as it is claimed that the respondent should have been convicted for an offence under section 326 of the Indian Penal Code and that the benefit of the provisions of section 4(1) of the Act has been wrongly given to the respondent.

(2) Briefly stated, the prosecution case is that Darshan Singh P.W. took his she buffaloes to Wattu minor, on 22nd April, 1973, at about 10.00 A.M. The buffaloes entered the water of the minor for taking water. Naib Singh respondent came there with a *Gandasa* in his hand and asked Darshan Singh P.W. to take his buffaloes out of the minor as their presence in the water caused dimunition of supply of water in the outlet. Darshan Singh P.W. told Naib Singh that he would take out his buffaloes after they had drunk water. On this, the respondent called bad names to Darshan Singh and gave one *Gandasa* blow from the sharp-edged side on his head in the middle portion. The occurrence was witnessed by Makhan Singh and Chuhar Singh who reached the spot.

(3) Darshan Singh P.W. went to his house with Makhan Singh and then went to Civil Hospital, Muktsar, on a trolley, where he was medically examined by Dr. S. K. Saluja (P.W. 1). A copy of the medicolegal report having been received at Police Station, Saddar, Muktsar, A.S.I. Punjab Singh went to Civil Hospital, Muktsar, and recorded the statement of Darshan Singh, Exhibit P.C. on the basis of which the F.I.R. was registered on 24th April, 1973 at about 4.15 P.M.

(4) Dr. S. K. Saluja (P.W. 1) medically examined Darshan Singh P.W. on 22nd April, 1973, at 2.10 P.M. and found the following injury on his person:—

1. An incised wound 4 cm. × ½ cm. bone deep on the top of head on mid line 8 cm. from hair line 15 cm. above left pinna.

This Doctor declared the injury as simple. Darshan Singh P.W. remained as indoor patient in the Civil Hospital at Muktsar from 22nd April,1973 to 29th April, 1973. After he was discharged from the Civil Hospital Muktsar, he got an order from the learned Magistrate on the basis of which he got himself X-rayed from Dr. O. P. Goyal (C.W. 1), Radiologist, Civil Hospital, Faridkot. Dr. O. P. Goyal, (C.W. 1) examined him on 16th May, 1973, for his skull X-ray and found a partial cut of the skull vault under injury No. 1, *vide* his report Exhibit C.W. 1/A and X-ray films C.W. 1/B and C. In his opinion, it was a deep cut involving whole of the outer table of the skull. However, he could not tell about the depth of the cut.

(5) In addition to the medical evidence, the prosecution produced Darshan Singh injured, (P.W. 3), Chuhar Singh (P.W. 4) and A.S.I. Punjab Singh (P.W. 5). The respondent denied his participation in the crime. He produced the defence evidence in support of the plea of alibi and further that on 22nd April, 1973, at 10.00 A.M., his brother Gulzar Singh had given the head injury to Darshan Singh P.W. in self-defence. The learned trial Magistrate after appreciating the evidence, came to the conclusion that the case of the prosecution stands amply proved and the defence version was not probable. The learned Magistrate came to the conclusion that respondent Naib Singh inflicted head injury on the person of Darshan Singh, injured P.W., and thus the learned Magistrate found him guilty for an offence under section 324 of the Indian Penal Code, as according to the learned Magistrate, the injury on the person of Darshan Singh P.W. was opined to be simple by Dr. Saluja. The learned Magistrate did not rely on the evidence of Dr. O. P. Goyal C.W. and came to the conclusion that the argument of the learned counsel for the accused that some wire was placed on the skull before the film was exposed to the X-ray equipment, appeared to be plausible. The learned Magistrate further observed that he was convinced that the mischief had been done during the time that elapsed between the discharge of Darshan Singh injured from Civil Hospital, Muktsar,

and his X-ray examination at Faridkot on 16th May, 1973, or at least such a possibility cannot be ruled out. After having recorded these findings the learned Magistrate then resorted to the provisions of section 4(1) of the Act and released the respondent on probation.

(6) We have very carefully gone through the statements of Dr. S. K. Saluja P.W. and Dr. O. P. Goyal (C.W. 1). We are unable to appreciate the observation of the learned trial Magistrate that the possibility of some wire having been placed on the skull before the film was exposed to X-ray equipment, existed. There is nothing on the record to draw any such inference. Dr. O. P. Goyal C.W., after having taken the X-ray, gave his opinion that X-ray of the skull indicated partial out of the skull vault. This opinion is Exhibit C.W. 1/A. This opinion was forwarded to Dr. S. K. Saluja P.W., who forwarded the X-ray film and the X-ray report to S.H.O., Police Station, Muktsar, with his own observation supporting the view that injury No. 1 was declared as simple. This endorsement is attached with Exhibit C.W. 1/A. It was in the background of this opinion that a Court question was put to this witness, which is as follows:—

> "C.Q. The X-ray report of Dr. O. P. Goyal showed partial cut of skull vault. On what authority the injury was still declared to be simple."

To this question, this witness answered as under:—

> "A. According to Modi's medical jurisprudence, 1967 Edition, Chapter A-I, at page 242, cutting of a bone does not necessarily involve a fracture of that bone. Since the injury was not extensive or serious and there was only a partial cut in my opinion, it was simple injury."

(7) It would be apparent from the above answer that there was no dispute that there was a partial cut of the bone. Since Dr. Saluja P.W. was of the opinion that the injury was not extensive or serious and there was only a partial cut, therefore, relying on Modi's Medical Jurisprudence, 1967 Edition, Chapter A-I, at page 242, he opined that the injury was simple. The learned Magistrate tried to act as Medical Expert and has made certain observations thereby refusing to rely on the testimony of Dr. Goyal C.W., which inferences are wholly unwarranted. There is no basis for him to say that a partial cut of the skull vault is seldom so much prominent except when excessive force is used in inflicting the injury. His observation

that there should have been a dent on the skull is again without any basis. The observation that in the present case the impression of the alleged fracture is white in colour, therefore, this fact alone lends colour to the argument of the defence counsel that some wire was placed on the skull before the film was exposed to X-ray equipment, is also without any basis. Even Dr. S. K. Saluja P.W. agreed with Dr. O. P. Goyal C.W: that there was a partial cut but he opined the injury as simple in view of the view expressed in Modi's Medical Jurisprudence. It was no one's case that the bone was not cut partially. The observation of the learned Magistrate that the mischief has been done during the time that elapsed between the discharge of the injured P.W. from the hospital at Muktsar, and his X-ray examination at Fardikot, is again without any basis as possibly nothing could be done as suggested. As already observed, it cannot be seriously disputed that there was a partial cut of the skull vault. It is true that Dr. S. K. Saluja did not notice the cut in the medicolegal examination, but the said cut was observed during the X-ray examination. Therefore, the only question to be seen is that in view of this partial cut, whether an offence under section 324 or that under section 326 of the Indian Penal Code, is made out. Clause seventhly of section 320 of the Indian Penal Code provides that a fracture or dislocation of a bone or tooth shall be designated as a grievous hurt. It is no doubt true that a fracture is not defined in the Indian Penal Code, but it is beyond the pale of controversy that if there is a break by cutting or splintering of the bone or there is a rupture or fissure in it, it would amount to a fracture within the meaning of clause (7) of section 320 of the Indian Penal Code. This has been so held by their Lordships of the Supreme Court in *Hori Lal and another* v. *The State of U.P.*, (1) where their Lordships observed as follows:—

> "It is not necessary that a bone should be cut through and through or that the crack must extend from the outer to the inner surface or that there should be displacement of any fragment of the bone. If there is a break by cutting or splintering of the bone or there is a rupture or fissure in it, it would amount to a fracture within the meaning of Clause 7 of Section 320. What Court has to see is whether the cuts in the bones noticed in the injury report are only superficial or do they effect a break in them."

(1) A.I.R. 1970 S.C. 1969.

(8) In view of what has been stated above, it is therefore, clear that the injury on the person of Darshan Singh P.W. was grievous. It may further be observed that in the opinion of Dr. S. K. Saluja, P.W., the injury was simple as he placed reliance on Modi's Medical Jurisprudence 1967 Edition, Chapter A-I, at page 242. This opinion of Modi is based on a bench decision of the Patna High Court in *Mutukdhari Singh and others* v. *Emperor*, (2). The view expressed in this case has been specifically over-ruled by their Lordships of the Supreme Court in *Hori Lal's case (supra)*. Their Lordships held that the presumption drawn in *Mutukdhari Singh's case* (supra) was misleading.

(9) For the reasons recorded above, we alter the conviction of the respondent from under section 324 of the Indian Penal Code to that under section 326 of the Indian Penal Code. He is, therefore, convicted for an offence under section 326 of the Indian Penal Code for which he was charged.

(10) We are also of the considered opinion that the benefit of the provisions of section 4(1) of the Act cannot be made available to the respondent, firstly in view of our finding that the respondent is guilty for an offence under section 326 of the Indian Penal Code. Section 4 of the Act will not be applicable as the offence under section 326 of the Indian Penal Code is punishable with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and secondly, we are of the opinion that the recourse taken by the trial Magistrate to the provisions of sub-section (1) of section 4 of the Act, without having called for the report of the Probation Officer thereby not duly complying with the provisions of sub-section (2) of section 4 of the Act, vitiates the order of probation. The provisions of sub-section (2) of section 4 of the Act, are as follows: —

> "4(2) Before making any order under sub-section (1), the Court shall take into consideration the report, if any of the probation officer concerned in relation to the case."

(11) The said provisions are mandatory. The reading of section 4 of the Act would leave no doubt in our mind that if the power conferred by sub-section (1) of section 4 of the Act, has to be

(2) A.I.R. 1942 Patna 376.

exercised, the Magistrate has no option but to send for the report of the Probation Officer and then to take the same into consideration before deciding whether the power under sub-section (1) of section 4 of the Act, should be exercised or not. This view of ours finds support from a decision of the Goa High Court in *State* v. *Naquesh G. Shet Govenkar and another*, (3).

(12) For the reasons recorded above, we are of the opinion that the provisions of section 4(1) of the Act cannot be made applicable to the present case.

(13) However, taking into consideration the fact that the occurrence took place in the year 1973, and keeping in view the fact that only one injury was given to the injured witness, we sentence the respondent to undergo rigorous imprisonment for one year under section 326 of the Indian Penal Code. However, the period of detention already undergone by him during the investigation and trial of the case, shall be taken into account. The appeal is, therefore, disposed of acordingly.

Kulwant Singh Tiwana, J.—I agree.

K.T.S.

APPELLATE CRIMINAL

Before D. S. Tewatia and D. B. Lal JJ.

STATE OF PUNJAB,—*Appellant.*

versus

PIARA SINGH,—*Respondent.*

Criminal Appeal No. 1482 of 1974

February 21, 1978.

Code of Criminal Procedure (2 *of* 1974)—*Section* 156 (1) *and* (2)—*Punjab Excise Act* (1 *of* 1914)—*Section* 161 (1)—*Investigation by a police officer not having territorial jurisdiction—Whether vitiates the trial—Section* 156 (2)—*Whether cures the defect.*

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(3) A.I.R. 1970 Goa Daman and Diu 49.