N. K. S.

Before S. S. Sandhawalia, C.J. and D. S. Tewatia, J.

SUSHIL KUMAR,—*Petitioner*

versus

THE STATE OF HARYANA,—*Respondent.*

Criminal Revision No. 139 *of* 1982.

November 25, 1983.

Code of Criminal Procedure (II of 1974)—*Sections* 360 and 361—*Probation of Offenders Act (XX of* 1958)—*Section* 4—*Opium Act*

(I of 1878)—Section 9—Release of a convict on probation—Whether discretionary with a Court—Large quantity of opium recovered from an accused convicted under section 9 of the Opium Act—Quantum of illicit opium so recovered—Whether could be a special reason to refuse probation—Guidelines to determine what constitutes large quantity.

Held, that the crucial words in section 360(1) of the Code of Criminal Procedure, 1973 are..... "that it is expedient that the offender should be released on probation". Plainly enough it would follow therefrom that the section is an enabling provision vesting a discretion in the convicting Court to grant probation only if it appears to be expedient to do so. It is not as if section 360 of the Code is an inflexible mandate to grant probation to eligible persons but indeed casts only a duty on the Court to consider the expediency or otherwise of the grant of probation. There is no gainsaying the fact that since section 361 of the Code requires a special reason for declining it in the case of a person eligible for its benefit, the broad rule would be the grant of the same and its refusal would be for good reason. The equally significant words in section 360(1) are ..... "the Court may, instead of sentencing him at once to any punishment.....". The word used herein again is 'may' and there is no reason to read it as 'shall'. Again, the aforesaid words expressly leave the alternative to the discretion of the Magistrate by using the word 'instead' for the two alternatives of sentencing him to punishment or the grant of probation. It is, thus, manifest that section 360 vests a discretion in the sentencing Court.

(Para 6)

Held, that the heinousness of the offence and its deleterious effect on the body politic is, in the eye of law, if not fundamental, a very relevant factor for the grant or refusal of probation. If that be so, opium smuggling for commercial gain is an offence which is deleterious to the society thus meriting a stringent sentencing policy and making it inexpedient to grant probation for such offences. The fact that the production of opium and its sale has been banned not only in India but in large parts in the world would show that its consumption is universally accepted as deleterious for the citizenry. Large scale opium smuggling is a reprehensible offence which tends to endanger the well being of the society generally. By its very nature, the crime is not a temperamental one or committed on the impulse of the moment but is a part and parcel of an organised underworld set up for commercial gain designedly by infracting the law. Such a crime attempts to make a trade out of felony. Undeniably large scale opium smuggling is done through an organised net-work of underworld crime and may well be labelled as a white-collared one which is difficult to combat. Consequently the recovery of a large haul of opium from a person proved to be guilty thereof is not merely a neutral or

irrelevant factor. It raises an inflexible inference that the offender is part and parcel of an organised racket. Thus, it is held that the proven recovery of a large haul of opium from a convicted accused would be a special reason within the meaning of Section 361 of the Code for declining the benefit of probation to him under section 360 of the said Code or under the provisions of the Probation of Offenders Act.

(Paras 7, 8 and 16).

Held, that opium is even used by addicts in minuscule quantity and even a *tola* of opium would be ample enough for a week or more for personal consumption of even a habitual addict. As a broad rule, recovery of 4 Kilograms or more would rule out that the possession thereof was for a mere personal consumption of an addict and would well raise the presumption that the offender was a cog in the wheel of underground smuggling of this contraband article.

(Para 10).

Gurbachan Singh *vs.* The State of Punjab, 1977 C.L.R. (Pb. and Haryana) 20.

Ujjagar Singh *vs.* The State of Punjab, 1982 (2) C.L.R. 697.

OVERRULED.

Case referred by a learned Single Judge Hon'ble Mr. Justice D. S. Tewatia to the larger Bench on 22nd April, 1982 for decision of an important question of law involved in this case. The larger Bench consisting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia and Hon'ble Mr. Justice D. S. Tewatia finally decided the case on 25th November, 1983.

Petition for revision Under Section 401 of Cr. P.C. of the Order of Shri Baru Ram Gupta, Additional Sessions Judge, Sonepat, dated 23rd January, 1982 affirming that of Shri Arjan Singh, Additional Chief Judicial Magistrate, Sonepat, dated 8th December, 1980, convicting and sentencing the petitioner.

CHARGES AND SENTENCES:—Under Section 9 of the Indian Opium Act. To undergo R.I. for one year and to pay a fine of Rs. 1,500 (Rupees Fifteen Hundred). In fefault of payment of fine the accused shall further undergo R.I. for a period of six months.

S. C. Kapoor, Advocate, *for the Petitioner.*

Muneshwar Puri, Advocate, *for the State.*

JUDGMENT

S. S. Sandhawalia, C.J.

1. Whether the recovery of a large haul of opium from an accused person convicted under section 9 of the Indian Opium Act would be a special reason within the meaning of section 361 of the Code of Criminal Procedure for declining the benefit of probation to him under section 360 of the said Code or under the provisions of Probation of Offenders Act, 1958, is the significant question necessitating this reference to the Division Bench.

2. On the 10th of September, 1976 at 5 a.m. Sushil Kumar petitioner was intercepted by a police party driving a car alone on the Grand Trunk road in the area of village Bahalgarh. The search of the car disclosed a small tank under the rear seat of the car containing 25 small packets of plastic, blue in colour, weighing in all 65 kilograms. In the trial, that followed, the petitioner was convicted under section 9 of the Opium Act by the Additional Chief Judicial Magistrate, Sonepat, who expressly declined the benefit of probation and sentenced him to one year rigorous imprisonment and a fine of Rs. 1,500. On appeal the Additional Sessions Judge, Sonepat upheld the conviction and even though pressed, declined to give the benefit of probation also.

3. This criminal revision had come up before my learned brother Tewatia, J., sitting singly, and before him the claim to probation was again strenuously pressed on the basis of Single Bench judgements of this Court and it was argued that the recovery of a large haul of opium was irrelevant to the issue and could not be deemed as a special reason for declining probation. Noticing some conflict of judicial opinion within the Court, the matter was referred for an authoritative decision.

4. At the very outset, it may be noticed that the conviction has not been and apparently could hardly be challenged on merits. Mr. S. C. Kapoor the learned counsel for the petitioner has primarily reiterated his stand for the grant of the benefit of probation on the ground that the large quantity of opium recovered from the petitioner is totally irrelevant to the issue under section 360 of the Code. Learned counsel contended that the said section itself provided the legal criteria where its benefit was to be accorded, e.g., in cases of persons of or above 21 years of age, if convicted for offences

punishable with 7 years or less and in cases of persons below 21 years, or women, for offences not punishable with death or imprisonment for life and further that they were not previous convicts. On this premise it was strenuously urged that the statute having itself spelt out the categories in which the benefit of section 360 of the Code was to be given and where it was not to be so done, then no further fetter can be put by judicial interpretation on the grant of probation under the Act. He argued that the only consideration for grant or refusal of probation where accused persons were otherwise eligible to the benefit of section 360 would be the age, character, and antecedents of the offenders specified therein. No other consideration, according to him, should be allowed to intervene including the large quantity of recovery of opium etc. Reference was made to a number of Single Benches but specific reliance was placed on *Gurbachan Singh* v. *The State of Punjab* (1) and *Ujjagar Singh* v. *The State of Punjab* (2) wherein even in the case of recovery of 4 kilograms or above of illicit opium, the benefit of probation was accorded to the accused.

5. In appraising the aforesaid contention, it must be noticed at the very outset that section 360 and 361 of the Code are integrated provisions which have to be read together. The harmonious construction thereof would indicate that in all cases where the offender would be eligible for the benefit of section 360 of the Code, special reasons within the meaning of section 361 have to be recorded for declining the said benefit to him. The Full Bench in *Joginder Singh* v. *State of Punjab* (3) has authoritatively held that the provisions of section 360 of the Code are mandatory in nature obviously in the sense that the Court must apply its judicial mind to the grant or refusal of the benefit thereof and cannot altogether ignore its provisions. That being so, the larger question is the true sentencing policy in proven cases of opium smuggling for commercial gain and specifically whether the large haul of its recovery would amount to a special reason for declining probation.

6. To my mind for purposes of the specific issue before us the crucial words in section 360 (1) are..... "that it is expedient that the offender should be released on probation". Plainly enough it would follow therefrom that the section is an enabling provision vesting

(1) 1977 C.L.R. (Pb. & Har.) 20.
(2) 1982(2) C.L.R. 697.
(3) (1981)1 I.L.R. Pb. & Hary. 1.

a discretion in the convicting Court to grant probation only if it appears to be expedient to do so. It is not as if section 360 of the Code is an inflexible mandate to grant probation to eligible persons but indeed casts only a duty on the Court to consider the expediency or otherwise of the grant of probation. There is no gainsaying the fact that since section 361 of the Code requires special reasons for declining it in the case of persons eligible for its benefit, the broad rule would be the grant of the same and its refusal would be for good reasons. It may then be noticed that the equally significant words in section 360 (1) are..... "the Court may, instead of sentencing him at once to any punishment.....". The word used herein again is "may" and there is no reason to read it as "shall" and it was not even remotely argued before us that this should be so construed. Again the aforesaid words expressly leave the alternative to the discretion of the Magistrate by using the word "instead" for the two alternatives of sentencing him to punishment or the grant of probation. It is thus manifest that section 360 vests a discretion in the sentencing Court. Therefore, the real question is what are the guidelines for exercising the judicial discretion for the grant of probation, and what would be the special reasons under section 361 of the Code for not doing so.

7. Now it is manifest from section 360 itself and equally from the analogous provisions of the Probation of Offenders Act, 1958 that the policy of the law is that where an offence is an overly heinous one grant of probation is ruled out as a matter of law. Therefore, the heinousness or the gravity of the offence would either bar probation altogether or render it inexpedient that it should be granted. It is apparently for the reason that under section 360 of the Code in the case of persons below twenty-one years, and even in case of women, if the offence is punishable with death or imprisonment for life, the law creates a bar for grant of probation whatever the age, character or antecedent of the offender. Similarly in cases of persons above twenty-one years even relatively lesser offences punishable for more than seven years create a similar bar under the said section. It would follow, therefore, that the heinousness of the offence and its deleterious effect on the body politic is, in the eye of law, if not fundamental, a very relevant factor for the grant or refusal of probation. If that be so, what remains to be seen is whether opium smuggling for commercial gain is an offence which is deleterious to the society thus meriting a stringent sentencing policy and making it inexpedient to grant probation for such offences.

8. Now the fact that the production of opium and its sale has been banned not only in India but in large parts in the world would show that its consumption is universally accepted as deleterious for the citizenry. It could not be disputed before us that large scale opium smuggling is a reprehensible offence which tends to endanger the well-being of the society generally. By its very nature, this crime is not a temperamental one or committed on the impulse of the moment but is a part and parcel of an organised underworld set up for commercial gain designedly by infracting the law. To use an old expression, such a crime attempts to make a trade out of felony. Undeniably large scale opium smuggling is done through an organised network of underworld crime and may well be labelled as a white-collared one which is difficult to combat. Consequently the recovery of a large haul of opium from a person proved to be guilty thereof is not merely a neutral or irrelevant factor. It raises the inflexible inference that the offender is part and parcel of an organised racket.

9. Again the mere fact that a man guilty of such an offence is a first offender in the sense that no earlier conviction stands proved against him would not necessarily imply that it is the first offence which he has in fact committed. It perhaps indicates only the fortuitous circumstance that he may have been caught for the first time. It is axiomatic that mere novices in this underworld trade would not be entrusted with large hauls of opium to be carried straightaway. In a way, such an offender must have graduated to this over a period of time in the underworld of crime. Thus even a first offence of the recovery of a large haul of opium may well raise the presumption that the accused is a well-seasoned runner in the illegal trade of opium smuggling.

10. What indeed would be a large haul of opium? Obviously no inflexible cut and dried definition thereof is either possible or desirable. All that calls for notice here is that opium is even used by addicts in minuscule quantity and it was stated at the bar and indeed not seriously disputed that even a *tola* of opium would be ample enough for a week or more for personal consumption of even a habitual addict. As a broad rule, we are inclined to take the view that a recovery of 4 kilograms or more would rule out that the possession thereof was for a mere personal consumption by an addict and would well raise the presumption that the offender was a cog in the wheel of underground smuggling of this contraband article.

11. Yet again the value which illegal opium fetches in its illicit trade itself would indicate that temptations are much large and lucrative to the professional criminals. It is needless to indulge in any guess as to the price of the opium in the underworld but there is no dispute that the financial gains of this crime are exceptionally lucrative which itself explains its prevalence not only within this country but in the international network of this crime.

12. In the light of the above, the issue, therefore, is whether it is expedient to release a person guilty of such a crime on probation, or in the alternative, would the Court exercise its judicial discretion for the grant of probation in favour of such an accused. I am inclined to take the view that a categoric answer to this question has already been rendered even in the context of a somewhat lower level of the adulteration of foodstuffs in *Pyarali K. Tejani* v. *Mahadeo Ramchandra Dange and others*, (4) in the following terms:—

> "The kindly application of the probation principle is negatived by the imperatives of social defence and the improbabilities of moral proselytisation. No chances can be taken by society with a man whose antisocial operations, disguised as a respectable trade, imperil numerous innocents. He is a security risk. Secondly, these economic offences committed by white collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit-making from numbers of consumers furnishes the incentive—not easily humanised by the therapeutic probationary measure. It is not without significance that the recent report (27th report) of the Law Commission of India has recommended the exclusion of the Act to social and economic offences by suitable amendments.
>
> * * * * *
>
> * * * * *
>
> .....In the current Indian conditions the probation movement has not yet attained sufficient strength to correct these intractables. May be, under more developed conditions a different approach may have to be made. For the present we cannot accede to the invitation to let off the accused on probation."

(4) A.I.R. 1974 S.C. 2228.

The aforesaid view has been reiterated with force again in *Prem Ballab and another* v. *The State* (*Delhi Admn.*) (5). It appears to be plain that what has been said above in the context of edible food and economic offences applies with even greater force to the smuggling of contraband opium for commercial gain.

14. Equally it appears to me that the issue herein is covered by way of analogy by the Full Bench in *Joginder Singh's case* (supra) in the context of the sentencing policy for offenders guilty of working stills. What has been said there with regard to illicit liquor, in my view, applies with greater stringency in the case of large hauls of illicit opium as well. Therefore, it is only in most exceptional circumstances that the general sentencing policy of declining probation to such accused persons can be possibly deviated from.

15. It remains to advert to the precedent cited on behalf of the petitioner. A reference to the judgment in *Gurbachan Singh's case* (supra) would indicate that the issue was not adequately debated and the pointed questions of the sentencing policy and as to what would amount to special reasons for denial of probation were hardly considered. However, if the judgment is considered to be an authority for the proposition that even the cases of proven recoveries of 4 kilograms and more of illicit opium would ordinarily invite the discretion of the Court in favour of the accused then the same does not appear to be a sound proposition and is hereby overruled. What has been said above applies equally to the brief observation in the operative part of the judgment in *Ujjagar Singh* v. *The State of Punjab,* (6). Therein even in a recovery of 5.25 kilograms of opium, the benefit of probation was accorded because the issue does not seem to have been adequately canvassed on behalf of the prosecution. With the greatest deference, if this judgment is to be read as an authority for holding that large hauls of opium are not a special reason for declining probation then the same is not good law and is hereby overruled. The other single Bench judgments which were referred to by the learned counsel for the petitioner pertained to somewhat lesser recoveries of opium and in any case did not advert to the legal issues pointedly and, therefore, do not call for individual notice.

(5) A.I.R. 1977 S.C. 56.
(6) (1982)2 C.L.R. 697.

16. To finally conclude, the answer to the question posed at the outset is rendered in the affirmative and it is held that the proven recovery of a large haul of opium from a convicted accused would be a special reason within the meaning of Section 361 of the Code for declining the benefit of probation to him under section 360 of the said Code or under the provisions of the Probation of Offenders Act.

17. In view of the aforesaid finding the only question of sentence urged on behalf of the petitioner in this criminal revision is concluded against the petitioner. The criminal revision is without merit and is hereby dismissed.

D. S. Tewatia, J.— I agree.