

Before Harnaresh Singh Gill, J.

RAJWINDER AND ANOTHER—Petitioner

versus

STATE OF PUNJAB—Respondent

CRR No.2365 of 2011

April 26, 2019

Indian Penal Code, 1860—S.292—Copy Right Act, 1957—Ss.63 and 68-A—Code of Criminal Procedure, 1973—S.360 and 361—Petitioners prepared and sold obscene video compact discs—Conditions under S. 360 Cr.P.C.—Age, antecedents of offender mandatory for trial Court, Appellate Court to consider release on probation.

Held that after going through the Section 360 Cr.P.C., it is clear that when any person not under 21 years of age is convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, or where any person under 21 years of age or any woman is convicted for an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender and 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 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.

(Para 25)

Further held that Courts below have apparently ignored the provisions of Section 360 and 361 Cr.P.C. In view of the said provisions, it was mandatory for the learned trial Court as well as the Appellate Court to consider the case of the accused for their release on probation.

(Para 26)

Further held that resultantly, while upholding the conviction of the petitioners as recorded by the Courts below, their substantive sentence of imprisonment is set aside. Instead, they are ordered to be released on probation for a period of one year subject to their executing

bonds to the satisfaction of the Chief Judicial Magistrate, Bathinda, undertaking to keep peace and be of good behaviour for the said period and to appear and receive the sentence as and when called upon to do so in case of violation of any of the conditions of the bonds.

(Para 27)

Anirudh Singh Shera, Advocate
for petitioner No. 1 and

Dinesh Sharma, Advocate \\
for petitioner No. 2 in CRR No. 2365 of 2011

Sukhdeep Singh Bhinder, Advocate
for the petitioner in CRR No. 2528 of 2011

Karan Singh, Advocate
for the petitioners in CRR No. 2900 of 2011

Sarabjit Singh Cheema, A.A.G., Punjab.

HARNARESH SINGH GILL, J.

(1) The petitioners were tried for committing the offences under Sections 63, 68-A of the Copy Right Act, 1957 and Section 292 IPC. Vide judgment and order dated 20.5.2010, the learned Additional Chief Judicial Magistrate, Bathinda, found the petitioners guilty for the aforesaid offences and sentenced them as under:-

Name of the convict	Offence	Sentence	Fine
Ashok Kumar	63 of copy right act	Rigorous imprisonment for one year.	Rs 2000/- In default of fine, convict is to undergo further rigorous imprisonment for two months
Ashok Kumar	68-A of copy Right Act	Rigorous imprisonment for one year.	Rs 2000/- in default of fine, convict is to undergo further rigorous imprisonment for two months.

Ashok Kumar	292IPC	Rigorous imprisonment for one year.	Rs 2000/- In default of fine, convict is to undergo further rigorous imprisonment for two months.
Rajwinder	63 of Copy Right Act	Rigorous imprisonment for one year.	Rs. 2000/- In default of fine, convict is to further rigorous imprisonment for two months.
Hari Mohan	63 of Copy Right Act	Rigorous imprisonment for one year.	Rs. 2000/- In default of fine, convict is to undergo further rigorous imprisonment for two months.
Sunil Kumar	63 of Copy Right Act	Rigorous imprisonment for one year	Rs. 2000/- In default of fine, convict is to undergo further rigorous imprisonment for two months.
Rajinder Kumar	63 of Copy Right Act		Rs. 2000/- In default of fine, convict is to undergo further rigorous imprisonment for two months.

(2) Aggrieved of the aforesaid judgment and order, the petitioners had preferred appeals before the learned Sessions Judge, Bathinda. Vide judgment dated 23.09.2011, the appeals filed by the petitioners were dismissed by the learned Additional Sessions Judge

(Fast Track Court), Bathinda. Still aggrieved, the petitioners have preferred these revisions.

(3) As per the prosecution case, on 16.4.2003, SI Balwinder Singh along with the other police officials was patrolling near Hanuman Chowk, Bathinda, where a secret information was received by ASI Sukhdev Singh that Ashok Kumar was dealing in the business of preparing and selling duplicate and obscene Video Compact Discs (hereinafter referred 'VCDs'). He after preparing the duplicate obscene VCDs in a large number, used to supply the same to the shopkeepers in the city and markets in the surrounding areas. It was further alleged that Rajwinder, Hari Mohan @ Mohni, Sunil Kumar and Rajinder Kumar, had been purchasing duplicate obscene VCDs and if a raid was conducted at the house of Ashok Kumar, they all could be caught red-handed.

(4) Ruqa Ex. P-18 was sent to the police station, on the basis of which, FIR Ex. P-19 was registered against all the accused.

(5) SI Balwinder Singh along with the police party raided the house of Ashok Kumar along with the Incharge, Police Post Verdman, Avinash, Manager, Pukhraj Cinema Bathinda and Hazura Singh. Four persons with cartons, suitcases and bags were present there. Ashok Kumar, on seeing the police party, fled from the spot and the remaining accused, namely, Hari Mohan, Rajinder Kumar, Sunil Kumar and Rajwinder, were apprehended. The VCDs were recovered from the cartons, suitcases and bags. All the items were sealed with seal bearing impression 'BS' after preparing parcels and were taken into possession by SI Balwinder Singh. Recovery memos Ex. P1 to Ex. P5 were prepared. All the four accused were arrested and, accordingly, their arrest memos and personal search memos were also prepared which stood proved on record as Ex.P-6 to Ex. P-13.

(6) Ashok Kumar was arrested on 22.4.2003 in the presence of Gurdas Singh. He suffered a disclosure statement that he he taken one room on rent for the business of preparing and selling duplicate and obscene VCDs and Samsung 3 VCD Changer, Videotex TV, CD writer, Accord Copier writer-8CD along with wrappers, polythene bags, remote, lens cleaner and blank CDs were kept there. On the information and disclosure statement of Ashok Kumar, all the above items were recovered from his rented room. Recovery memo Ex. P-15 was prepared. Statements of the witnesses under Section 161 Cr.P.C. were recorded.

(7) After completing investigation, challan was presented before the Court concerned. Finding a prima facie case, charges under Sections 63 and 68-A of Copy Right Act and Section 292 IPC were framed against the petitioners.

(8) All the accused pleaded not guilty and claimed trial.

(9) In order to prove the guilt of the accused, the prosecution had examined PW1-SI U.C.Chawla, PW2-SI Balwiinder Singh and PW3- Mukesh Sharma, Executive, Anti-Piracy, T-Series Industries.

(10) In their statements recorded under Section 313 Cr.P.C., the accused denied the prosecution, pleaded false implication and claimed trial

(11) As stated above, the accused-petitioners were convicted under Sections 63, 68-A of Copy Right Act and Section 292 IPC vide judgment dated 20.5.2010 passed by the trial Court. The appeals filed by the accused-petitioners were also dismissed by the appellate Court on 23.9.2011.

(12) I have heard the learned counsel for the accused-petitioners and the learned counsel for the State of Punjab.

(13) It is argued by the learned counsel for the accused-petitioners that the accused-petitioners had never been into the business of preparing or selling duplicate and obscene VCDs nor any recovery thereof was ever effected from them. It has been pointed out that there are material contradictions in the statements of prosecution witnesses and independent witnesses Hazura Singh and Avinash Singh had not been examined by the prosecution. It is further argued that only official witnesses had been examined, who being interested in the success of the prosecution case, cannot be relied upon to bring home the guilt of the accused-petitioners.

(14) It has further been pointed out that Ashok Kumar is 30% handicap and is not able to walk but as per prosecution Ashok Kumar had run away from the spot, when other accused were caught, is not believable. It is also argued that PW-3 Mukesh Sharma is not trustworthy and was never authorized by the Company for the test of VCDs which were allegedly recovered from the accused-petitioners.

(15) On the other hand, learned State counsel has argued that the accused-petitioners have been rightly convicted and sentenced as recovery of duplicate and obscene VCDs in large number, was effected from them. It was proved on record that the said VCDs, were being

supplied in the city market and the markets in the surrounding areas. On the said premise, while defending the impugned judgments and order passed by the Courts below, a prayer has been made to dismiss the present petitions, being devoid of any merit.

(16) I have given my thoughtful consideration to the rival contentions of the parties.

(17) Accused-petitioners were apprehended with a large number of duplicate VCDs and obscene cassettes. Petitioner-Ashok Kumar had taken a room on rent and he had suffered a disclosure statement Ex. P-14. Even the testimony of PW-1 and PW-2 cannot be ignored. Non-examination of the private witnesses is no ground to discard the prosecution version as it is quality and not quantity of the evidence, which matters. It could not be pointed out as to in which manner, the accused-petitioners have suffered any prejudice on account of non-examination of the witnesses other than the official witnesses.

(18) Keeping into consideration the cogent and trustworthy evidence produced by prosecution, I do not find any illegality or infirmity in the judgments and order passed by the Courts below. In view of the said fact, no ground is made out for interference in the conviction recorded by the Courts below, which is accordingly, upheld.

(19) Coming to the quantum of sentence, as per the custody certificate, out of total sentence of one year, the petitioners have undergone actual sentence as under:-

Name of the petitioner	Actual Sentence
Rajwinder	01 month and 19 days
Sunil Kumar	01 month and 23 days
Ashok Kumar	02 month and 10 days
Rajinder Kumar	02 month and 12 days
Hari Mohan	01 month and 23 days

(20) In the instant case, the FIR had been registered on 16.4.2003. The petitioners have been facing the agony of trial for the last 16 years. Besides, the petitioners are not previous convicts. Thus, no useful purpose will be served by sending the petitioners behind the bars once again to undergo the remaining sentence. It is a fit case, where the petitioners, who are otherwise not reflected to be a previous offenders, can be released on probation.

(21) In compliance of the order dated 16.1.2019, status report by way of affidavit of Gurjit Singh Romana, DSP City-I, Bathinda has been filed wherein it has been stated that there is no other FIR or security proceedings initiated/pending against petitioner-Rajwinder Singh @ Raju except the present FIR.

(22) In my view, Sections 360 and 361 of the Code of Criminal Procedure would mandate a Court to consider the release of an accused on probation. The Hon'ble Supreme Court in *Chandreshwar Sharma* versus *State of Bihar*¹, while considering such mandate, has held to the following effect:-

“3. The appellant herein was convicted under Sections 379 and 411 Indian Penal Code 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 negatived 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. Pursuance 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 forum below had considered the question of applicability of Section 360 of the Criminal Procedure Code. 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 shall record in its judgment the specific reasons for not having done so. (Emphasis Supplied). This has apparently not been done, inasmuch as the Court overlooked the provisions of Sections 360 and 361 of the Criminal Procedure Code. As such, the

¹ (2000) 9 SCC 245

mandatory duty cast on the Magistrate has not been performed.....”

(23) Similar is the view taken by this Court in *Akhtar and another* versus *State of Haryana*²

(24) In *CRR No. 4103 of 2012 titled Akhtar and another* versus *State of Haryana*, this Court has held as under:-

“In my view, the provisions of Sections 360 and 361 Cr.P.C. would mandate a Court to consider release of a person on probation and where the prayer is declined without recording much reasons, same would be violative of the provisions of Sections 360 and 361 Cr.P.C. In this regard, the counsel for the petitioners has placed before me *Chandreshwar Sharma Versus State of Bihar, JT 2000(2) SC 36*, similar view is expressed. Here also, the appellant before the Hon'ble Supreme Court was convicted for offences under Sections 379 and 411 IPC and was sentenced to one year RI. The Appellate Court had affirmed the conviction but none of the forums had considered the question of applicability of Section 360 of the Code. The Hon'ble Supreme Court has held that while refusing to grant the benefit of Section 360, the Court has to record specific reasons in the judgment. Neither the trial Court nor the Appellate Court have recorded any reason for which the Courts did not consider it fit to release the petitioners on probation, they being first offenders.

The provisions of Section 360 Cr.P.C. are as under:-

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

² 2013(8) RCR (Criminal) 2992.

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).

(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.

(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.

(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.

(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: 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.

(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.

(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.

(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 recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the 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 such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or 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.”

(25) After going through the Section 360 Cr.P.C., it is clear that when any person not under 21 years of age is convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, or where any person under 21 years of age or any woman is convicted for an offence not punishable with death or imprisonment

for life, and no previous conviction is proved against the offender and 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 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.

(26) The Courts below have apparently ignored the provisions of Sections 360 and 361 Cr.P.C. In view of the said provisions, it was mandatory for the learned trial Court as well as the Appellate Court to consider the case of the accused for their release on probation.

(27) Resultantly, while upholding the conviction of the petitioners as recorded by the Courts below, their substantive sentence of imprisonment is set aside. Instead, they are ordered to be released on probation for a period of one year subject to their executing bonds to the satisfaction of the Chief Judicial Magistrate, Bathinda, undertaking to keep peace and be of good behaviour for the said period and to appear and receive the sentence as and when called upon to do so in case of violation of any of the conditions of the bonds.

(28) With the above modification, all the aforementioned revision petitions stand disposed of.

Shubhreet Kaur