A STATE OF KARNATAKA

v.

RAJU

SEPTEMBER 14, 2007

B [DR. ARIJIT PASAYAT AND P.P. NAOLEKAR, JJ.]

Penal Code, 1860; Section 376:

C *Rape of a minor below 12 years of age—Trial Court found the accused guilty of offence punishable u/s.376 and imposing sentence of 7 years—Sentence reduced to 3½ years by High Court—On appeal, Held: Measure of punishment in a case of rape must depend upon conduct of the accused, state and age of the victim and gravity of criminal act—Crime of violence upon women need to be severally dealt with—In a case of rape, s. 376(2) shows* D *the legislative mandate in imposing a sentence, which could be extended to life imprisonment, thus, reflects the intent of stringency in sentence—In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix—In the facts and circumstances of the case and in view of the provisions of law, reduction of the sentence by the High Court without assigning any special and adequate reasons, is* E *unsustainable and, thus, set aside and sentence as imposed by the trial Court restored—Sentencing.*

Proportion between crime and punishment—Discussed in the context of sentencing.

F *Proviso—Construction of—Discussed in the context of sentencing u/s.376 IPC.*

A girl, aged less than 12 years, was allegedly sexually ravished by the accused-respondent. First Information Report was lodged and police G **investigated the matter. On completion of investigation, charge-sheet was filed by the Police. The trial court convicted the accused under Section 376 IPC. An appeal was preferred by the accused before the High Court. The same was disposed of by the High Court maintaining the conviction but sentence was reduced to 3½ years. Hence the present appeal.**

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Appellant contended that in a heinous crime like rape, the High Court was not justified in reducing the sentence by referring to certain circumstances which are not only irrelevant but also cannot constitute special reasons warranting reduction in sentence. A

Amicus Curiae submitted that though the offence of rape is a heinous crime but while sentencing an accused the same should be tempered with mercy. Though such a plea was not taken before the trial court, High Court indicated some reasons which may not be sufficient to justify the reduction in the sentence per se, yet as it exercised judicial discretion, there is no need for interference; and that both the Courts below have noted that the victim was aged about 10 years, and in such a case, stringent punishment is provided for in terms of Section 376(2)(f) IPC. B C

Allowing the appeal, the Court

HELD:1.1. In sub-section (2) of Section 376 I.P.C. more stringent punishment can be awarded taking into account the special features indicated in the said sub-section. The present case is covered by Section 376(2)(f) IPC i.e. when rape is committed on a woman when she is under 12 years of age. Admittedly, in the case at hand the victim was 10 years of age at the time of commission of offence. [Para 7] [975-C] D

1.2. It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso particularly in such like penal provisions. The courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. Recourse to the proviso can be had only for "special and adequate reasons" and not in a casual manner. Whether there exist any "special and adequate reasons" would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application. [Para 9] [976-B, C] E F

Dinesh Alias Buddha v. *State of Rajasthan,* [2006] 3 SCC 771, relied on. G

2.1. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. [Para 8] [975-D, E] H

A **2.2. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the respondent. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced. [Para 8] [975-F, G]**

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2.3. The legislative mandate to impose a sentence, for the offence of rape on a girl under 12 years of age, for a term which shall not be less than 10 years, but which may extend to life and also to fine reflects the intent of stringency in sentence. [Para 9] [975-G; 976-A]

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2.4. In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the D **motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. [Para 11] [976-F, G]**

Sevaka Perumal etc. **v.** *State of Tamil Nadu,* **[1991] 3 SCC 471, relied on.**

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Law in Changing Society by Friedman, **referred to.**

2.5. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. [Para 14] [977-D, E]

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2.6. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court.

G **[Para 15] [977-G, H]**

Dennis Councle MCGDautha **v.** *State of Callifornia,* **402 US 183: 28 L.D., relied on.**

2.7. In the absence of any foolproof formula which may provide any basis

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for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished. [Para 15] [978-A, B] A

Shailesh Jasvantbhai and Anr. v. *State of Gujarat and Ors.*, **[2006] 2 SCC 359, relied on.** B

3. Considering the legal position and in the absence of any reason which could have been treated as "special and adequate reason" reduction of sentence as done by the High Court is clearly unsustainable. The trial court should have imposed sentence of 10 years in terms of Section 376(2)(f) IPC. However, since the State has not questioned the sentence as imposed, the sentence as imposed by the trial court is restored. [Para 17] [978-C, D] C

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 782 of *2001.*

From the Judgment and Order dated 11.02.2000 of the High Court of Karnataka in Criminal Appeal No. 825 of 1995. D

Sanjay R. Hegde for the Appellant.

Ashok Bhan and S. Wasim A. Qadri for the Respondent. E

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Karnataka High Court reducing the custodial sentence of respondent to 31/2 years instead of seven years as was imposed by the learned Second Additional Sessions Judge, Gulbarga, in SC No.61/1993, after convicting the respondent for an offence punishable under Section 376 of the Indian Penal Code, 1860 (in short the 'IPC'). The victim (PW1) was aged less than 12 years when she was sexually ravished by the respondent on 31.1.1993 at about 12.30 p.m. F

2. On the basis of First Information Report (in short the 'FIR') lodged at the police station law was set into motion. On completion of investigation, charge-sheet was filed and accused faced trial and he pleaded innocence. Prosecution placed reliance on the evidence of victim and the medical evidence. The trial court convicted the accused under Section 376 IPC. An appeal was preferred before the High Court. The same was disposed of by the High Court G H

A maintaining the conviction but sentence was reduced to 31/2 years, since the High Court felt that in view of certain special reasons the custodial sentence was to be reduced to 31/2 years.

3. In support of the appeal, learned counsel for the State submitted that in a heinous crime like rape the High Court was not justified in reducing the B sentence by referring to certain circumstances which are not only irrelevant but also cannot constitute special reasons warranting reduction in sentence. Since the accused was not represented in this appeal in spite of service of notice, Mr. Ashok Bhan, appeared as Amicus Curiae at our request.

C 4. According to learned Amicus Curiae, though the offence of rape is a heinous crime but while sentencing an accused the same should be tempered with mercy. Though such a plea was not taken before the trial court, High Court indicated some reasons which may not be sufficient to justify the reduction per se, yet as it exercised judicial discretion, there is no need for interference. It has to be noted that the victim was less then 12 years of age D at the time of occurrence. In fact both the trial court and High Court have noted that she was aged about 10 years. Stringent punishment is provided for where the victim is less than 12 years of age in terms of Section 376(2) (f) IPC.

5. The minimum punishment is 10 years but the proviso provides that E for "adequate and special reasons" mentioned in the judgment a sentence of less then 10 years can be imposed. Unfortunately this aspect appears to have been lost sight of by both the trial court and the High Court and the State has also not questioned the inadequacy of sentence on that ground. The High Court has noted as follows to reduce the sentence:

F "The learned counsel for the appellant contended that the accused is a young boy of 18 years and he is illiterate and rustic.

Though he is not actually aged 18 years, he could not take the plea of his age on account of illiteracy and thus he has lost the chance of taking the benefit of reformatory Legislation or seeking a G remand to Borstal School etc., For the illiteracy and ignorance of the accused, it should not be taken as a ground for not taking the defence in the trial and this is a circumstance to award reduced sentence. Accused has already served in jail for 2 years 11 months.

In view of the fact that the accused is a young boy of 18 years H

belonging to Vaddara Community and Illiterate, I think it just and proper to reduce the sentence from seven years RI to three and half years R.I. Appeal is partly allowed."

6. It needs no emphasis that the physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery.

7. It is to be noted that in sub-section (2) of Section 376 I.P.C. more stringent punishment can be awarded taking into account the special features indicated in the said sub-section. The present case is covered by Section 376(2)(f) IPC i.e. when rape is committed on a woman when she is under 12 years of age. Admittedly, in the case at hand the victim was 10 years of age at the time of commission of offence.

8. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the respondent. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced.

9. The legislative mandate to impose a sentence, for the offence of rape on a girl under 12 years of age, for a term which shall not be less than 10

A years, but which may extend to life and also to fine reflects the intent of stringency in sentence. The proviso to Section 376(2) IPC, of course, lays down that the court may, for adequate and special reasons to be mentioned in the judgment, impose sentence of imprisonment of either description for a term of less than 10 years. Thus, the normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years' RI, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years' RI can also be awarded. It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso particularly in such like penal provisions. The courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. Recourse to the proviso can be had only for "special and adequate reasons" and not in a casual manner. Whether there exist any "special and adequate reasons" would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application.

10. These aspects were highlighted in *Dinesh Alias Buddha* v. *State of Rajasthan,* [2006] 3 SCC 771.

11. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

12. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal etc.* v. *State of Tamil Nadu,* [1991] 3 SCC 471.

13. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

14. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

15. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of

A balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Councle MCGDautha* v. *State of Callifornia,* (402 US 183: 28 L.D. 2d 711) that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable B criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

16. These aspects were highlighted in *Shailesh Jasvantbhai and Anr.* C v. *State of Gujarat and Ors.,* [2006] 2 SCC 359.

17. Considering the legal position and in the absence of any reason which could have been treated as "special and adequate reason" reduction of sentence as done by the High Court is clearly unsustainable. The trial court should have imposed sentence of 10 years in terms of Section 376(2(f) IPC. D But State has not questioned the sentence as imposed, the sentence as imposed by the trial court is restored. The High Court's order reducing the sentence is set aside.

18. The appeal is allowed.

E S.K.S. Appeal allowed.