Satto and Others

Vs

State of U. P.

Criminal Appeal No. 239 of 1979

(V. R. Krishna Iyer, R. S. Pathak JJ)

26.04.1979

JUDGMENT

KRISHNA IYER, J. -

1. Concurrent convictions by both the courts below have, by a rule of restriction and circumspection which this Courts often adopts under Article 136, persuaded me to circumscribe the leave to appeal to the critical question of punishment, usually answered by courts untouched by current humane criteria and drowned in the superstition that the gravity of the crime and the tariff prescribed in the Penal Code have a monopolistic hold on the sentencing court. Quackery in criminology is a deficiency in forensic justicing - especially disastrous in sensitive areas like juvenile sentencing when unlettered punishment becomes unwitting crime.

2. The present case is an illustration of judicial habituation to prescribing sentences conditioned by the offence and its milieu forgetting the fundamental fact that the human delinquent, not the criminal deviance, is the cynosure of punitive processing. The further Gandhian axiom follows that crime is like disease, and correction, not cruelty, has dominance in the sentencing calculus. The sadistic appeal to severity of infliction taken on a sublimated form in the judicial process, as has happened in the instant case. The farewell to the reform of the vernal criminals.

3. Three boys between the ages of ten and fourteen with simmering sex urges amidst societal inhibitions, and infatuating stimulations, came by an eleven year old girl tending cattle in a village, and this, by happen-stance, was near a neglected brick kiln which temptingly offered protective privacy for carnal assault. This lascivious opportunity excited the three juveniles, otherwise engaged in cutting grass, into erotic experimentalism. They advanced aggressively towards the artless victim, tied up by way of preventive detention a young cowherd who chanced to be near the scene and forcibly went through the adolescent exercise of rape. The courts below have held the three petitioners guilty of an offence under Section 376, IPC and we do not feel it right to nibble at probabilities and disturb that conclusion.

4. Current Indian ethos and standards of punitive deterrence make rape a heinous offence. The offenders, however, are children and the dilemmatic issue is to fix the sentencing guidelines when juvenile delinquents come before the court. 'Justice and the Child' is a distinct jurisprudential-criminological branch of socio-legal speciality which is still in its infant status in India and many other countries. The Children Act is a preliminary exercise; the Borstal School is an experiment in reformation and even Section 360, CrPC tends in the same direction. Correction informed by compassion, not incarceration leading to degeneration, is the primary aim of this field of criminal justice. Juvenile justice has constitutional roots in Articles 15(3) and 39(e) and the pervasive

humanism which bespeaks the superparental concern of the State for its child-citizens including juvenile delinquents. The penal pharmacopoea of India, in tune with the reformatory strategy currently prevalent in civilised criminology, has to approach the child offender not as a target of harsh punishment but of humane nourishment. This is the central problem of sentencing policy when juveniles are found guilty of delinquency. A scientific approach may insist on a search for fuller material sufficient to individuate the therapy to suit the criminal malady. As the United States Supreme Court stated in Williams v. New York (337 US 241, 249), pre-sentence reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.

Judge F. Ryan Duffy has written :

> If the judge has before him a complete and accurate pre-sentence investigation report which sets forth the conditions, circumstances, background, and surroundings of the defendant, and the circumstances underlying the offence which has been committed, the judge can the impose sentence with greater assurance that he has adopted the proper course. He can do so with much greater peace of mind.

5. Regrettably, our juvenile justice system still thinks in terms of terror, not cure, of wounding, not healing, and a sort of blind man's buff is the result. This negative approach converts even the culture of juvenile homes into junior jails. From the reformatory angle, the detainees are left to drift, there being no constructive programmes for the detainees not correctional orientation and training for the institutional staff. I highlight these drawbacks largely because the State's response to punitive issues relating to juveniles has been stricken with 'illiteracy' and must awaken to a new 'enlightenment', at least prompted by the International Year of the Child. Patricia M. Wald has strengthened this perspective in a recent book on "Pursuing Justice for the Child" : (pp. 135-136)

Juvenile detention needs a new focus and a new rationale. The detention period ought to be used to begin to draw together resources necessary for constructive change, whether or not the juvenile is adjudicated. There is abundant evidence that detention has failed as an isolated interlude between those more dramatic parts of the juvenile justice system - arrest and trial or disposition.

The Juvenile Judge still has a vital function to fulfill in detention. The judge is charged with the solemn determination whether to deprive juveniles of liberty or whether they can be released in their parents' custody or to a third party and, if so, what conditions should apply to the release. In making such a decision the judge should follow due process hearing procedures and the legal presumption should favour release. If the decision is to detain, the judge must make a record to support that decision. The legality of preventive detention in the juvenile court needs to be tested. If the power is upheld, the procedural safeguards should be as precise as they are for adults. We should abandon the notion that secure detention is good for the child.

Some legal absolutes seem imperative; jail for juveniles should be outlawed; status offenders should not be put into secure detention; finite limits should be set on how long a child can be detained before or after adjudication; minimum standards for physical structure, staff, and program should be enforced by the courts. Even then, we should not cease inquiring whether there are yet better and more enlightened ways to use the interlude after arrest to help juveniles so that, unless they are innocent, or so blighted that removal from the community before or after trial is an almost

indisputable necessity, there may be no need for the rest of the process at all.

6. These general observations of futuristic import apart, we have to concretise the measures to be taken in the present case under the available law and the available facilities. The mainstream of criminal justice has not been refined by restorative legislations.

7. We have the Uttar Pradesh Children Act, 1952 and 'approved schools' of sorts under it. We have provision for juvenile courts (Section 60), Reformation Officers (Section 34), and a flexible cluster of factors, social and personal, to be taken into consideration in passing orders when a tender-aged delinquent is to be taken into custodial care by the court (Section 68). Reports by Reformation Officers have a helpful role in the sentencing process. The finer focus of sentencing is not furious reaction to the offence but habilitative rescue of the youthful offender from moral-material abandonment and careful reformation by kindling his creative potential. Judicial responsibility is not mechanistic but humanistic, and the ritualistic magistrate is a misfit. Section 70 of the U.P. Children Act highlights it :

> 70. Principles to be observed by Courts in dealing with children before it, either as needing care or as an offender or otherwise shall have regard to have welfare of the child and shall in a proper case take steps for removing him from undesirable surroundings and for securing that proper provision is made for his education and training.

8. Functionally, a judicial order on a child must be guided by this legislative value judgment. Non-custodial disposition of the young offender is permissible under Section 30 of the Act which reads :

> 30. Power to discharge youthful offender or to commit him to suitable custody. - (1) A court may, if it thinks fit, instead of directing any youthful offender to be detained in an approved school, order him to be -
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> (a) discharged after due admonition; or
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> (b) released on probation of good conduct and committed to the care of his parent or guardian or other adult relative or other fit person, on such parent, guardian, relative or person executing a bond, with or without sureties, as the Court may require, to be responsible for the good behaviour of the youthful offender for any period not exceeding three years and for the observance of such other conditions as the Court may impose for securing that the youthful offender may lead an honest and industrious life.

The Court may order that the youthful offender released under this clause may be placed under the supervision of a Reformation Officer or of some other person appointed for the purpose by the Court.

> (2) If it appears to the Court on receiving a report from the Reformation Officer or otherwise that the offender has not been of good behaviour during the period of the probation, it may, after making such inquiry as it thinks fit, order the offender to be detained in an approved school.

9. Indeed, a conscientious judge may consider it of better service to society :

> If the criminal's past history gives good reason to believe that he is not of the naturally criminal type, that he is capable of real reform and of becoming a useful citizen, there is no doubt that probation, viewed from the selfish standpoint of protection to society alone, is the most efficient method that we have. And yet it is the least understood, the least developed, the least appreciated of all our efforts to rid society of the criminal.

The basic idea underlying a sentence to probation is very simple. Sentencing is in large part concerned with avoiding future crimes by helping the defendant learn to live productively in the community which he has offended against. Probation proceeds on the theory that the best way to pursue this goal is to orient the criminal sanction towards the community setting in those cases where it is compatible with the other objectives of sentencing. Other things being equal, the odds are that a given defendant will learn how to live successfully in the general community if he is dealt with in that community rather than shipped off to the artificial and a typical environment of an institution of confinement. Banishment from society, in a word, is not the way to integrate someone into society. Yet imprisonment involves just banishment - albeit for a temporary sojourn in most cases.

This is of course not to say that probation should be used in all cases, or that it will always produce better results. There are many goals of sentencing, some of which in a given case may require the imposition of a sentence to imprisonment even in the face of a conclusion that probation is more likely to assure the public that the particular defendant will not offend again. And there are defendants as to whom forced removal from the environment which may in some part have contributed to their offence may be the best beginning to a constructive and useful life.

10. Appeal and revision provided under Section 79 of the Act involve the higher courts in the process. We are sad that this crucial judicial task has been discharged with lesser awareness of its seriousness and complexity than necessary. For instance the Sessions Court, oblivious of the offender and obsessed with the offence, in brief confirmation, spent one sentence on sentence :

> Due to seriousness of the crime there is no justification to release the appellants on probation.

11. The High Court devoted a paragraph but was upset by the criminal act and closed its mind to salvaging the sentence :

> Lastly, it is urged that the sentence awarded to the revisionists be reduced in view of their ages. I am reluctant to do so because they committed a crime which repels against moral conscience. They chose a girl of 11 years to satisfy their lust. They spoiled her life by committing this offence as her father would experience considerable difficulty in arranging her marriage. They were so cruel that all the three committed rape on that minor child. Such an act deserves to be deprecated. The sentence awarded by the learned lower courts does not at all err on the side of severity. Moreover, the learned lower courts have already shown sympathy by keeping them in an approved school at Etawah.

12. While the victim needs reparation, failure to pay heed to, which is a blind spot in our criminal justice system, the offender's circumstances are material in sentencing, omission to notice which is a systematic, though traditional, failing. We find no emphasis on the age, antecedents, parental and

social circumstances and curative possibilities or Reformation Officer's report bearing on the three children punished. The Children Act makes meticulous provisions which slumber on the statute book and seek no visa into the court room. We hope this elaborate discussion will activate sentencing wisdom vested in the criminal courts.

13. At this late stage, without prolonging the process, we can only direct some pragmatic steps. No report from a Reformation Officer is available. No consideration of the social milieu, personal antecedents, parental influences, educational status and other material factors is apparent in the judgments. Nor, indeed, is there any serious advertence to the advantages of community-oriented reformation or the disadvantages of institutional inter-mix and quasi-incarceration. The juvenile detention system, it must be noted, has not fulfilled itself even in countries where it is heavily funded like in the U.S.A. where the young delinquents are penned like cattle, demoralized by lack of activities and trained staff, often brutalized. Over half the facilities in which juveniles are held have no psychiatric or social work staff. A fourth have no school program. The median age of detainees is fourteen : the novice may be sodomized within a matter of hours. Many have not been charged with a crime at all. From New York to California, the field reports repeat themselves depressingly.

Our 'approved schools' like our adult prisons sometimes remind us of animal farms, if only judges care to visit jails. (Patricia M. Wald, Pretrial Detention for Juveniles - Pursuing Justice for the Child ed. by Margaret K. Rosenheim, p. 119)

14. These blemishes, in far worse measure, have blighted out Homes and Schools and approved custodial institutions, although our correctional repertory, augmented by meditational, recreational and craft-oriented Gandhian tools, may inexpensively expand and deepen the rehabilitative potency of our sentencing strategies in this area. Be that as it may, the U.P. Children Act appears to have been virtually given a go-by in the courts below, a phenomenon which frequently happens because practising lawyers and judicial officers have not yet given the deeper reflection that welfare-oriented rehabilitative legislations of the mentally and morally retarded in the criminal justice field deserve. The Criminal Procedure Code, 1973, has made provision in Section 360 to deal with persons under 21 years of age convicted of offences, punishable with imprisonment for a term of seven years or less and Section 376, IPC, cannot come within its purview. But the U.P. Children Act defines a 'youthful offender' to mean "any child who has been found to have committed an offence punishable with transportation or imprisonment". Thus, life imprisonment for the offence does not take the delinquent out of the category of youthful offender as defined in Section 2(13) of the said Act. Section 30 authorises the Court, if it thinks fit, instead of directing any youthful offender to be detained in an approved school, order him to be released conditionally, as earlier indicated. We think that the present case deserves action under Section 30.

15. Rape is horrific true. The victim is a pathetic child and deserves not merely commisseration but also compensation, an aspect which the State will take not of when a proper application is made to it. Our immediate problem is the disposition of the appellants who are also very young. They have served out some term in an 'approved school' which, making a realistic appraisal, is a 'junior jail'. It is not as if these little lads are incorrigible rapists or violent toughs running amock. Parental neglect, tempting opportunity sex perversion libadences libidinous environs and a host of other factors where state inaction is contributory to exciting adolescent erotica count for vulgar, vicious or violent delinquency. These boys can and should be rehabilitated, and that is done best by obligating the parent to take care of the children concerned and not by institutionalised custody. Section 30 of the Act is attracted by the facts of this case to the extent we are able to glean from the meagre material

on record. We hope that when children are brought before court, the provisions of the Children Act will be remembered by the Bench and the Bar and its rehabilitative engineering set in motion.

16. In the present case, we direct the appellants to be released on probation of good conduct and committed to the care of their respective parents and if no surviving parent then their guardian executing a bond each, without sureties, to be responsible for the good behaviour of the youthful offender for a period of two years from the date of release and for the observance of a condition, namely, that the child shall be put to school or continue its studies if it is already at school and attend any recreational or meditational centre if any, of the parent's choice regularly. Many systematic experiments, acknowledged in prison reports and judgments of trial Courts have proved the therapeutic value of transcendental mediation viz-a-viz juvenile delinquents. ((a) In the superior court of the State of Arizona dated March 5, 1976 in State of Arizona v. Jean Custon Preslay - Case 6878) (b) Criminal action 4 - 81750 in the U.S. District of Michigan - United States of America v. Robert Charles Rusch, Jr.) (c) Kentucky LJ Vol. 60, 1971-72 No. 2 and University of Maryland Law Forum Vol. VIII No. 2 Winter 1973 - article by David E. Sykes) (d) Hiralal Mallick v. State of Bihar, (1977) 4 SCC 44 : 1977 SCC (Cri) 538) (e) Chapter 9, Juvenile Delinquency and the T. M. Programme : Freedom from Crime by Roger Glenn Langhear D. 159 (Nellen Publishing Co. N.Y.). The Reformation Officer having jurisdiction over the locality shall have supervision over each of the appellants and shall make a report once in three months to the trial court. If the report shows lapse into bad behaviour, the court may direct detention of the deviant appellant or appellants in an approved school. The Reformation Officer will explain to the parents of the delinquents and the appellants the import of this order so that they may appreciate the necessity for compliance therewith and co-operate in the rehabilitatory process.

17. I may venture a view in conclusion that the revolutionary contribution Indian culture may make to criminology is apt to be the focus on human consciousness whose mutilation leads to sickness, crime and sorrow and whose restoration collective and individual, is the insurance against psychic stress and its off-shoots - crime and related maladies. The technology of sentencing must release man from distortions and pressures on lines ancient and modern. This parenthesis, in a sense, argues for the new orientation in juvenile justice.

18. A copy of this order will be sent to the approved school, Etawah, and to the trial Judge for immediate compliance. A copy of the order will also be served on the Advocate for the appellants for communication to and compliance by his clients and to the Home Department for correctional actions.

Pathak, J. - (concurring) &#65533;

The petitioners were convicted by the learned Assistant Sessions Judge, Aligarh for the offence under Section 376 of the Indian Penal Code and sentenced to two years' rigorous imprisonment. He directed their detention for the period of their sentence in an approved school at Etawah. Their appeal was dismissed by the learned Additional Sessions Judge, Aligarh. The High Court declined to interfere in revision. From the material on the record it is not possible to say that the finding of the courts below that the petitioners committed the offence is not substantiated by the evidence on the record and, in my opinion, no case has been made out for interfering with the conviction. But so far as the sentence is concerned, I think that the High Court and the courts below have not sufficiently appreciated the need for a proper order. Special leave granted on the question of sentence only.

Order on the appeal

20. The appellants are children. At the time of the offence the age of three appellants ranged between 10 years and 14 years, the youngest, Satto, being 10 and the eldest, Bucha, being 14. They were cutting Rizka in their village fields when Kumari Bismillah, who was then about 12 years old, passed by grazing her cattle. Apparently, the three youngsters were seized with the temptation of having sex with her and borne on that impulse they forced the girl inside a brick kiln and committed rape on her, after securing a bystander, Baboo, who was also grazing his goats at the spot, to a tree. There can be no doubt that the act cannot possibly be condoned. It calls for severe condemnation by the plainest moral standards. But on the question of sentence, the High Court and the courts below have, almost mechanically, affirmed a sentence of two years imprisonment to be served out by detention in an approved school. They have failed to apply their mind to considerations which are relevant when a youthful offender is sentenced. The U.P. Children Act, 1951 contains two provisions in that regard. Section 29 provides that where a child is found to have committed an offence punishable with transportation or imprisonment, the court, if satisfied on inquiry that it is expedient so to deal with the child, may order him to be sent to an approved school for a stated period. Section 30 provides :

> 30. Power to discharge youthful offender or to commit him to suitable custody - (1) A court may if it thinks fit, instead of directing any youthful offender to be detained in an approved school, order him to be -
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> (a) discharged after due admonition; or
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> (b) released on probation of good conduct and committed to the care of his parent, guardian or other adult relative or other fit person on such parent, guardian, relative or person executing a bound, with or without sureties, as the court may require, to be responsible for the good behaviour of the youthful offender for any period not exceeding three years and for the observance of such other conditions as the court may impose for securing that the youthful offender may lead and an honest and industrious life.

The Court may order that the youthful offender released under this clause may be placed under supervision of a Reformation Officer or of some other person appointed for the purpose by the court.

> (2) If it appears to the court on receiving a report from the Reformation Officer or otherwise that the offender has not been of good behaviour during the period of the probation, it may after making such inquiry as it thinks fit order the offender to be detained in an approved school.

Almost invariably the question will arise whether the youthful offender should be proceeded against under Section 29 or Section 30. The answer to the question lies in the judgment of the court, which judgment must be made in the sound exercise of its discretion. Among the considerations to which the court must apply its mind are the age of the child, his family background, his general past conduct and antecedents, the circumstances in which he committed the offence, and which of the measures provided by the statute, Section 29 or Section 30, will more effectively and yet not harshly enable the child to develop into a responsible member of society. It must be remembered that the U.P. Children Act deals with children, and a "child" is defined by Section 2(4) as a person under the

age of sixteen years. The statute is concerned with a person whose personality, judgment and discretion has not yet attained maturity. The primary object then must be to place the child in an environment conducive to his rehabilitation and providing scope for corrective action. That appears to be the basic criterion for determining the choice between Section 29 and Section 30. In a case where the child has acted on impulse in committing an offence, and there is nothing to show the presence of any vicious streak of character, it would be more appropriate to leave him to the care and attention of parental authority rather than to send him to an approved school. That will depend, however on whether parental attention is possible and forthcoming and whether it does not suffer from want of sufficient effectiveness in moulding the proper moral development of the child. In my opinion, having regard to the facts and circumstances of the present case the order contemplated by Section 30(1)(b) of the Act would more appropriately meet the ends of justice and serve the object of the statute.

21. Accordingly, the appeal is allowed on the question of sentence. The sentence imposed by the learned Assistant Sessions Judge and affirmed by the learned Additional Sessions Judge and the High Court, is set aside. The appellants are ordered to be released on probation of good conduct and to be committed to the care of their respective parents and if no surviving parents then their guardian on such parents or guardian executing a bond each without sureties, to be responsible for the good behaviour of the youthful offender for a period of two years from the date of the release and for the observance of a condition that the child should be put to school or continue his studies if he is already in school and regularly attend and recreational center or meditational centre (if any) of the parent's choice. The Reformation Officer enjoying jurisdiction in the locality will have supervision over each of the appellants and shall make a report once every three months to the trial Court. The Reformation Officer will explain to the appellants and their parents the import of this order.

22. A copy of this order will be sent to the approved school, Etawah, and to the trial Court for immediate compliance. A copy of the order will also be served on counsel for the appellants for communication to, and compliance by, the appellants.

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