SUPREME COURT OF INDIA

T. K. Gopal

Vs.

State of Karnataka

Crl.A.No.443 of 2000

(S. Saghir Ahmad and Doraiswamy Raju, JJ.)

05.05.2000

JUDGEMENT

S. SAGHIR AHMAD, J.:-

1. Leave granted.

2. The appellant was found guilty of the offence under Section 376, IPC and was sentenced to 10 years' rigorous imprisonment and to pay a fine of Rupees one thousand, in default of which he was to undergo RI for another three months, by the Addl. Sessions Judge, Tumkur, by her judgment dated September 30, 1994. This has been upheld by the High Court by the impugned judgment dated January 24, 1997. The appellant is in jail and it is from the jail that he has filed the present appeal. Mr. Seeraj Bagga has appeared as counsel for the appellant and it was in his presence that the order dated 10th September, 1999 was passed by this Court, which reads as under :-

"Delay condoned.

The victim of rape in this case is a child of one and half year. The petitioner has been convicted under Section 376, IPC and sentenced to ten years' rigorous imprisonment. Section 376, IPC provides that on the offence of rape being established, the Court shall sentence the accused with rigorous imprisonment for a term not less than ten years, but "which may be for life" and shall also be liable to fine. The proviso to sub-section (2), however, allows the Court to impose a sentence of imprisonment of either description for a term which may be less than ten years.

Having regard to the facts of this case, especially the age of the victim, we issue notice to the petitioner to show cause why the sentence of ten years' rigorous imprisonment should not be enhanced to life imprisonment. The notice shall be returnable within six weeks."

3. Mr. Seeraj Bagga has argued the case with full vehemence at his command and has also filed written submissions in which he has set out the extenuating circumstances on the basis of which he has prayed that the sentence may not be enhanced to life imprisonment.

4. The victim in the instant case is an infant child, Yashoda of the tender age of one half year. Her mother, Uma (PW1) lived with her husband in a rented house at Konehalli village with her children, a son aged about four years and the infant daughter, Yashoda. The appellant, at that time, was a Mistry working in that village. Uma was working as a maid-servant in the house of Gowramma (CW2). She also worked as a mason-labour under the appellant. Her husband worked as a Waterman in the Water Supply Department. The case of the prosecution is that the appellant, as a Mistry, used to provide ration to Uma (PW1) who used to cook food for the appellant and his colleagues, including CW7 Raja, CW8 Gandhi as also another person, Murthy. The appellant and his associates used to go to the house of Uma for lunch between 1.30 PM to 3.00 PM. On 22nd June, 1991, at about 3 P.M., appellant came to the house of Uma, but did not express any desire to have his meal. The appellant, on the contrary, indicated to her that he would take rest for a while. Her children were sleeping in the house and Uma, while allowing the appellant to take rest, went to the neighbour's house to grind rice for preparing 'Idlis' for the next day. She returned to her house at about 4.45 PM and was shocked to see the appellant lying over her daughter, Yashoda, who was lying below his private parts. She rushed towards the appellant and pushed him aside. She found her daughter bleeding from the private parts and also noticed bleeding near her lips. She cried for help whereupon the appellant ran away. The child was taken to Arasikere hospital where the doctors intimated the police and on the police reaching the hospital, the complainant narrated the whole incident whereupon a case was registered against the appellant under Section 376, IPC. The case was investigated and a charge sheet was subsequently submitted against the appellant, who was tried for the offence under Section 376, IPC and ultimately convicted and sentenced to ten years' RI. The appeal filed by him was dismissed by the High Court. The trial Court as also the High Court have recorded concurrent findings of fact that the appellant committed rape on a child of one and half year. These findings are based on the evidence brought on record. The medical report as also the

statement of the complainant clearly establish the commission of the offence by the appellant.

5. Having regard to the facts of this case, the question that arises now is whether the Addl. District Judge was justified in awarding a sentence of 10 years' RI to the appellant or he should have been awarded the life imprisonment, which is the maximum sentence prescribed under the IPC. Section 376 (2), IPC provides, inter alia, as under :

"376. Punishment for rape -

(2) Whoever, -

. . . . . .

(f) commits rape on a woman when she is under twelve years of age;

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine :

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."

6. A perusal of the above provision would indicate that where the victim is a woman of less than 12 years of age, the minimum sentence that can be awarded to the accused is ten years, but it may also extend to life imprisonment apart from a fine which may also be imposed upon him. The proviso to this section, however, gives a discretion to the Court to award a sentence of less than 10 years for adequate and special reasons which have to be mentioned in the judgment.

7. Since the victim in the instant case was an infant child of one and half year, the trial Court as also the High Court both were right in awarding a sentence of 10 years to the appellant. That was wholly in consonance with the provisions of Section 376 (2), IPC. The question, however, is that if the law gave the Court the discretion to award even life imprisonment for the offence of rape under Section 376(2), IPC, why was that discretion not exercised by the trial Court or the High Court in the instant case where the victim of rape was an infant child. The trial Court, while awarding ten years' RI to the appellant has observed as under :

"2. In view of the submissions made before me, though I have to agree with the submission of the learned counsel for the accused that there is reformation in the mind of the accused as he is in custody as undertrial prisoner for more than an year and there are dependents depending upon him, as the offence committed by him is of such a grievous nature that leniency with regard to the awarding of punishment cannot be exercised and also as the victim of the offence was hardly 1 and half years old at the time of commission of offence without having the capacity of self defence and the victim for no fault of her has been made to suffer a black mark of the incident throughout her life who know even at the cost of her future comfortable living. In a decision, reported in 1987 Cri LJ 374 (Gujarat) in the very opening of the Judgment, Their Lordships have observed that "Human weakness or wickedness; either of the two or both of them together may be the cause of sexual offences. If the offence is on account of wickedness, the accused naturally deserves no sympathy." In this case, the fact of the accused could only be attributed to wickedness. As such, the accused deserves no sympathy at the hands of this Court. Such acts should be put down with a strong hand and a deterrent punishment should generally be awarded. In a decision, reported in 1994 Crl LJ 1752 (Bombay) in a similar case, where the victim was hardly aged 7 years, Their Lordships while awarding sentence have observed as hereunder :

". . . . .Our attention was invited to the provisions contained in Section 376(2) of the Indian Penal Code, which made the child rape punishable under clause (f) thereof, was made punishable with rigorous imprisonment for a term which shall not be less than 10 years, but which may be for life and shall also be the liability to fine. Thus, when the legislature itself has indicated the minimum limit of the leniency that could be shown in such cases, it would not be justifiable to show more leniency than what is deserved in a case of the present type, on the ground that the revision-petitioner was a young man.'

3. In the circumstances, in view of the above decision and taking into consideration the nature and gravity of offence committed by the accused and the tender age of the victim, I am not inclined to show any leniency in awarding punishment to the accused.

8. The High Court, while upholding the findings of fact recorded by the trial Court did not advert itself to the question of enhancement of sentence as, perhaps in its opinion, the sentence of ten years' RI was sufficient for the offence committed by the appellant.

9. Mr. Seeraj Bagga, Advocate, appearing as amicus curiae, in this case has in his written statement pointed out the following extenuating circumstances on the basis of which it is prayed that the sentence may not be enhanced :

"Reformation of the petitioner

5. That the petitioner is in judicial custody from the date of his arrest after 22-6-1991 and has been undergoing the sentence since then. That there has been a reformation in the mind of the accused since he is in custody. In this regard, the observation of the trial Court is reproduced below :

"Page 38, Para 2. In view of the submissions made before me, though I have to agree with the submission of the learned counsel for the accused that there is reformation in the mind of the accused as he is in custody as undertrial prisoner for more than a year."

It is respectfully submitted that this observation was recorded by the trial Court on 30-9-1994, i.e. after about 3 years from the date of incident and it is very likely that after such a long period in the judicial custody, after having pondered over the whole matter, self realisation and introspection, the reformation of the petitioner cannot be denied as it is well known that now a days religious discourses, meditation and other reformatory programmes are undertaken for the benefit of the prisoners confined in jails. Thus, in this view of the matter, it is respectfully submitted that the Hon'ble Court may take a sympathetic and lenient view of the matter and discharge the Notice of enhancement of sentence.

Mitigating circumstances

6. That it is respectfully submitted that in view of the following mitigating circumstances, the Hon'ble Court may take a lenient view of the matter as the petitioner is the sole bread earner of his family, which includes besides his wife, his two daughters aged about 16 and 10 years respectively. There is no other source of help to the petitioner's family and the wife of the petitioner is with a great difficulty running the family by doing labour work.

That this Hon'ble Court in the case reported as (1983) 3 SCC 217 : (AIR 1983 SC 753 : 1983 Cri LJ 1096) entitled Bharwada Bhoginibhai Hirjibhai v. State of Gujarat reduced the sentence awarded in view of the special circumstances which existed in favour of the appellant therein. It may be stated that in that case, the conviction under Section 376 read with Sections 511, 354 and 342, IPC was upheld by the Hon'ble Court but the sentence was reduced in view of the special circumstances which were as under :-

(a) The appellant lost his job in view of the conviction recorded.

(b) The incident occurred some 7 years back from the date of the decision of the Appeal by this Hon'ble Court.

(c) A long time had elapsed after the dismissal of the appeal by the High Court.

(d) Appellant was to be sent back to the jail after six and half years.

(e) The appellant must have suffered great humiliation in the society.

(f) The prospects of getting a suitable match for appellant's own daughter had perhaps been marred in view of the stigma in the wake of the finding of guilt recorded in the context of the offence.

The Hon'ble Court taking a cumulative effect of all these special circumstances, reduced the sentence for an offence under Section 376 read with Section 511, IPC from two and a half years RI to 15 months RI.

That on behalf of the petitioner, it is respectfully submitted that even though the offence and the conviction recorded in the above mentioned case is different from that in the present case but the similar special mitigating circumstances also arise in the present case which should be taken into consideration by the Hon'ble Court at least for the purpose of discharging the Notice of enhancement of sentence which the Hon'ble Court has issued to the petitioner as in the present case, it is quite evident that :-

(a) That as a result of the arrest and conviction of the petitioner, who was the sole bread earner and was maintaining the family, his two daughters and wife are suffering and are without any help.

(b) That the incident occurred around 9 years back and the record of the case reveals that the petitioner is in custody since the date of incident.

(c) That the petitioner and his family has suffered great humiliation in the society.

(d) That the petitioner has two daughters aged about 16 and 10 years and the prospects of getting a suitable match for them have been marred to a great extent in the wake of this conviction and sentence and the fact that the petitioner is in custody for the last about 9 years.

(e) That the sentence of 10 years RI awarded to the petitioner would be over within a year or so and

if the Hon'ble Court at this stage enhances the sentence to life imprisonment then the family of the petitioner and particularly his two daughters and their future would be ruined for no fault of theirs.

That in view of the above special mitigating circumstances which exists in favour of the petitioner and his family, it is respectfully prayed that the Hon'ble Court may take a sympathetic view of the matter and discharge/withdraw the notice of enhancement of sentence issued to the petitioner."

10. Mr. Seeraj Bagga has also pointed out that the State has not filed any appeal for the enhancement of the sentence.

11. Crime can be defined as an act that subjects the doer to legal punishment. It may also be defined as the commission of an act specifically forbidden by law; it may be an offence against morality or social order. In State of Punjab v. Gurmit Singh, (1996) 2 SCC 384 : (1996 AIR SCW 998 : AIR 1996 SC 1393), Anand, J. (as His Lordship then was), observed in Para 21 of the report as under :

"Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity."

12. In Bodhisattwa Gautam v. Subhra Chakraborty (Ms.), (1996) 1 SCC 490 : (1996 AIR SCW 325 : AIR 1996 SC 922), one of us (S. Saghir Ahmad, J.), while delivering the Judgment, observed as under :

"9. Unfortunately, a woman, in our country belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal rights. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not playthings for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles

assigned to them by Nature so that the society may flourish as they alone have the talents and capacity to shape destiny and character of men anywhere and in every part of the world.

10. Rape is thus not only a crime against the person of a women (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not unfortunately, take care of the social aspect of the matter and are inept in many respects."

13. In the matter of punishment for offence committed by a person, there are many approaches to the problem. On the commission of crime, three types of reactions may generate; the traditional reaction of universal nature which is termed as punitive approach. It regards the criminal as a notoriously dangerous person who must be inflicted severe punishment to protect the society from his criminal assaults. The other approach is the therapeutic approach. It regards the criminal as a sick person requiring treatment, while the third is the preventive approach which seeks to eliminate those conditions from the society which were responsible for crime causation.

14. Under the punitive approach, the rationalisation of punishment is based on retributive and utalitarian theories. Deterrent theory which is also part of the punitive approach proceeds on the basis that the punishment should act as a deterrent not only to the offender but also to others in the community.

15. The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including the family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, may be a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy (See : Sunil Batra (I) v. Delhi Administration, AIR 1978 SC 1675 : (1978) 4 SCC 494 : 1979 (1) SCR 392 : (1978 Cri LJ 1741); Sunil Batra (II) v. Delhi Administration, AIR 1980 SC 1579 : (1980) 3 SCC 488 : 1980 (2) SCR 557 : (1980 Cri LJ 1099); Charles Sobraj v. Superintendent, Central Jail, Tihar, AIR 1978 SC 1514 : (1978 Cri LJ 1534) and Francis Coralie Mullin v. The Administrator, Union Territory of Delhi,

(1981) 1 SCC 608 : AIR 1981 SC 746 : 1981 (2) SCR 516 : (1981 Cri LJ 306) etc.).

16. Sexual offences, however, constitute an altogether different kind of crime which is the result of a perverse mind. The perversity may result in homosexuality or in the commission of rape. Those who commit rape are psychologically sadistic persons exhibiting this tendency in the rape forcibly committed by them.

17. In some States in the USA, therefore, emphasis was laid on psychotherapic treatment of the offender while he was under detention. For that purpose, Psychopath Sexual Offenders Laws have been enacted in certain jurisdiction in USA. These laws treat the sex offenders as neurotic persons and psychotherapic treatment is given to them during the period of their detention which may, in some cases, be an indefinite period, in the sense that they would not be released till they are cured. But the provision for indefinite detention even beyond the maximum period of imprisonment for that offence was seriously objected to by a group of lawyers and, therefore, in many of the States, this provision was dropped from the Statute.

18. Here, in India, statutory provision for psychotherapic treatment during the period of incarceration in the jail is not available in India, but reformist activities are systematically held at many places with the intention of treating the offenders psychologically so that he may not repeat the offence in future and may feel repentant of having committed a dastardly crime.

19. The question of sentence in such cases was considered by Krishna Iyer, J. in Phul Singh v. State of Haryana, (1979) 4 SCC 413 : (AIR 1980 SC 249 : 1980 Cri LJ 8), in which he observed that sentencing efficacy in cases of lust-loaded criminality cannot be simplistically assumed by award of long incarceration, for, often that remedy aggravates the malady. He further observed that, a hyper-sexed homo sapien cannot be rehabilitated by humiliating or harsh treatment. In that case it was found that the appellant was a young man of 22 years with no criminal antecedents save the offence of rape committed by him. The learned Judge thought that given correctional courses through meditational therapy and other measures, his erotic aberrations may wither away, particularly as the appellant had a reasonable prospect of shaping into a balanced person. But, this theory was not followed in later decisions as it was found that in spite of devices having been employed and adopted within the jail premises so as to reform the offenders, there was negligible improvement in the commission of crime. The crime, instead of declining, had increased and, today, it has assumed dangerous proportions. While one person is reformed and moves out of jail, another offender is born. Consequently, in two recent decisions, relating to the offence of rape, one rendered by the present Chief Justice of India and the other by Brother Lahoti, the sentence was enhanced in State of Karnataka v. Krishnappa, 2000 (3) JT (SC) 516 : (2000 AIR SCW 1040), while in the other case, namely, State of Rajasthan v. Noore Khan, 2000 (3) JT (SC)643, the order of acquittal passed by the High Court was set aside and substituted by an order of conviction.

20. However, having regard to the extenuating circumstances pointed out by Mr. Seeraj Bagga in the instant case, specially the fact that the appellant's two daughters have come of age and are to be married, we feel that the present period of incarceration of the appellant in jail is enough and he should not be made to further suffer the consequences of his bestiality. We therefore, while dismissing the appeal, recall the notice issued to the appellant for enhancement of his sentence.

Appeal dismissed.