SUPREME COURT OF INDIA

Shimbhu

Vs.

State of Haryana

Crl.A.Nos.1278-1279 of 2013

(P.Sathasivam CJI., Ranjana Prakash Desai and Ranjan Gogoi JJ.)

27.08.2013

JUDGMENT

P.SATHASIVAM, CJI.

1. Leave granted.

2. These appeals are directed against the final judgment and order dated 22.02.2011 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal Nos. 577 and 479 of 1998 whereby the High Court dismissed the appeals filed by the appellants herein while affirming the conviction and sentence dated 30/31.03.1998 awarded by the Additional Sessions Judge, Narnaul.

3. Brief facts:

(a) The case relates to the gang rape of the victim in village Nangal Durgu, Haryana. Purushottam-her grandfather, had a shop in the said village. Balu Ram (the appellant herein) also had a shop adjacent to the shop of Purushottam. On 28.12.1995, at about 5.00 a.m., when the prosecutrix (PW-3) came out of her house to attend the call of nature, Shimbhu (A-1) and Balu Ram (A-2)-the appellants herein, met her and asked her to accompany them to their shop. When she tried to resist their attempt, they threatened her by pointing out a knife with dire consequences. They took her inside the shop of Balu Ram (A-2) and raped her, turn by turn. They kept her confined in the same shop for two days, i.e., 28.12.1995 and 29.12.1995 and committed rape upon her repeatedly. It was only on 29.12.1995, she was allowed to leave the said place when the appellants-accused learnt that her

family members were on her look out. When she reached her house, she narrated the entire incident to her family members.

(b) On 30.12.1995, the prosecutrix, accompanied by her father – Luxmi Narain Sharma (PW-4), went to the Police Station Nangal Chaudhary and lodged a First Information Report (FIR) being No. 195 dated 30.12.1995 under Sections 376(2)(g), 366, 342, 363, 506 read with Section 34 of the Indian Penal Code, 1860 (in short 'IPC').

(c) After investigation, the case was committed to the Court of the Additional Sessions Judge, Narnaul which was numbered as Sessions Case No. RT-9 of 28.08.1997/11.03.1996 and Sessions Trial No. 4 of 28.08.1997/25.03.1996. The Additional Sessions Judge, vide order dated 30/31.03.1998, convicted and sentenced the appellants to undergo rigorous imprisonment (RI) for ten years along with a fine of Rs. 5,000/- each, in default, to further undergo RI for six months for the offence punishable under Section 376(2)(g) read with Section 34 of IPC. The appellants were also sentenced to undergo RI for three years along with a fine of Rs. 1,000/- each, in default, to further undergo RI for two months for the offence punishable under Section 366 read with Section 34 of IPC. They were further sentenced to undergo RI for three months along with a fine of Rs. 200/- each, in default, to further undergo RI for fifteen days for the offence punishable under Section 342 read with Section 34 of IPC. They were also sentenced to undergo RI for one year along with a fine of Rs. 500/- each, in default, to further undergo RI for one month for the offence under Section 506 read with Section 34 of IPC.

(d) Being aggrieved of the order of conviction and sentence, the appellants herein preferred Criminal Appeal Nos. 577 and 479 of 1998 before the High Court. The Division Bench of the High Court, by a common order dated 22.02.2011, dismissed the appeals and confirmed the order of conviction and sentence dated 30/31.03.1998 passed by the Additional Sessions Judge, Narnaul.

(e) Being aggrieved of the above, the appellants herein have preferred these appeals by way of special leave before this Court.

4. Heard Mr. Rishi Malhotra, learned counsel for the appellants-accused herein and Mr. Brijender Chahar, learned senior counsel for the respondent- State.

5. The only contention of Mr. Rishi Malhotra, learned counsel is with regard to the settlement arrived at between the appellants-accused and the victim dated 24.12.2011, in the form of an affidavit by the victim filed before this Court, based on which he prayed for the reduction of sentence to the period already undergone. On the other hand, Mr. Brijender Chahar, learned senior counsel for the respondent – State vehemently contended that in view of the statutory provision, as it stood, in the absence of adequate and special reasons and the offence being a gang rape having minimum sentence of ten years, the same cannot be reduced to the period already undergone merely because the victim has entered into a settlement with the accused. He also brought to our notice the Criminal Law (Amendment) Act, 2013, which not only deleted the proviso which enables the court to reduce the minimum sentence by giving adequate and special reasons but also enhanced the minimum sentence to twenty years, which may extend to life which shall mean imprisonment for the remainder of that person's natural life and with fine. He also pointed out that for the said purpose the legislature has introduced new Section, namely, Section 376D IPC, which came into effect from 03.02.2013.

6. In the light of the limited relief prayed, there is no need to go into the aspects relating to conviction and sentence. In other words, the only question to be considered in these appeals is whether the appellants- accused have made out a case for imposition of a lesser sentence than ten years?

7. During the pendency of the above appeals, the appellants-accused placed on record an affidavit dated 24.12.2011 signed by the victim. In the said affidavit, the deponent had stated that she was the prosecutrix in the instant case which arose out of FIR No. 195 dated 30.12.1995 under Sections 363, 366, 342, 376(2)(g), 506/34 IPC registered at P.S. Nangal Chaudhary which is 16 years old where she was a consenting party to the alleged act. She also stated that due to passage of time and the fact that the deponent has settled/compromised the said matter with the accused persons on account of they belonging to neighbouring village and also of the fact that the deponent is married since January, 1999 and has four children, she did not want the said case to be pursued any further. She further stated that she is living happily with her husband for the last twelve years. Finally, she stated that in view of the compromise entered into by her with the accused persons and in order to buy peace and to maintain dignity in her matrimonial life, she has no objection if the sentence of the appellants be reduced to the period already undergone.

8. We carefully perused the contents of the said affidavit. It contains two pages and the deponent has signed in Hindi, that too only on the last page. Nothing was brought to the notice before any forum. In these circumstances, let us consider the

relevant provision, as it stood on the date of the incident, and various decisions of this Court. Sentencing Policy under Section 376(2)(g) of IPC:

9. The crucial stage in every criminal proceeding is the stage of sentencing. It is the most complex and difficult stage in the judicial process. The Indian legal system confers ample discretion on the judges to levy the appropriate sentence. However, this discretion is not unfettered in nature rather various factors like the nature, gravity, the manner and the circumstances of the commission of the offence, the personality of the accused, character, aggravating as well as mitigating circumstances, antecedents etc., cumulatively constitute as the yardsticks for the judges to decide on the sentence to be imposed. Indisputably, the sentencing Courts shall consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the crime committed.

10. Before we evaluate the case at hand in the light of above established principle that all punishments must be directly proportionate to the crime committed, it is imperative to comprehend the legislative intent behind Section 376(2)(g) IPC which is as under:

> "376. Punishment for rape.—
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> (1) Whoever, except in the cases provided for by sub- section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:
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> Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.
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> (2) Whoever,-
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> (a) Being a police officer commits rape-
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> (i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) Being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) Being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) Being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) Commits rape on a woman knowing her to be pregnant; or

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

(g) Commits gang rape, 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."

11. A perusal of the above provision shows that the legislative mandate is to impose a sentence, for the offence of gang rape, for a term, which shall not be less than 10 years, but it may extend to life and shall also be liable to fine. 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 gang rape is committed is not less than 10 years though in exceptional

cases, the Court by giving “special and adequate reasons", can also award the sentence of less than 10 years.

12. It is a fundamental rule of construction that a proviso must be considered in relation to the main provision to which it stands as a proviso, particularly, in such penal provisions. Whether there exist any "special and adequate reason" would depend upon a variety of factors and the peculiar facts and circumstances of each case. This Court, in various judgments, has reached the consensus that no hard and fast rule can be laid down in that behalf for universal application.

13. It is on this proviso to the Section, the accused is relying upon and praying for a reduction of sentence of imprisonment for a term of less than 10 years. Based on the following three grounds, the accused seeks for reduction of sentence than prescribed by the statute:

> Firstly, on the ground that a compromise has been arrived at between the parties;
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> Secondly, that the occurrence of the incident dates back to 1995; and
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> Lastly, that the victim is happily married and blessed with children.

14. This Court, in a catena of cases, has categorically reiterated that none of the grounds raised will suffice to be ‘special and adequate reasons’ even if put together.

15. In Kamal Kishore vs. State of H.P. (2000) 4 SCC 502, a three-Judge Bench of this Court arrived at the conclusion that the fact that the occurrence took place 10 years ago and the accused or the victim might have settled in life is no special reason for reducing the statutory prescribed minimum sentence, stating:

> “22. The expression "adequate and special reasons" indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons. What the Division Bench of the High Court mentioned (i.e. occurrence took place 10 years ago and the accused might have settled in life) are not special to the accused in this case or to the situations in this case. Such reasons can be noticed in many other cases and hence they cannot be regarded as special reasons. No catalogue can be

prescribed for adequacy of reasons nor instance can be cited regarding special reasons, as they may differ from case to case.

23. As the reasons advanced by the Division Bench of the High Court could not be supported as adequate and special reasons learned Counsel for the accused projected an alternative profile in order to support his contention that there are adequate and special reasons. He submitted the following: Shishna Devi (PW2) has since been married to another person and she is now mother of children and is well-settled in life. The accused was aged 23 when the offence was committed and now he is 34, but he remains unmarried. He says that on two occasions his marriage had reached the stage of engagement but both had to be dropped off before reaching the stage of marriage due to the social stigma and disrepute which surrounded him. These are the reasons which he advanced for extending the benefit of the proviso.

24. Those circumstances pleaded by him are not special reasons for tiding over the legislative mandate for imposing the minimum sentence. We, therefore, enhance the sentence for the offence under Section 376 I.P.C. to imprisonment for 7 years."

Similar view was taken in the State of A.P. vs. Polamala Raju @ Rajarao (2000) 7 SCC 75.

16. In State of M.P. vs. Bala @ Balaram (2005) 8 SCC 1, this Court held that the long pendency of the criminal trial or offer of the rapist to marry the victim are no relevant reasons for exercising the discretionary power under the proviso of Section 376(2) IPC. This Court further held as under:

"11. The crime here is rape. It is a particularly heinous crime, a crime against society, a crime against human dignity, one that reduces a man to an animal. The penal statute has prescribed a maximum and a minimum punishment for an offence under Section 376 I.P.C. To view such an offence once it is proved, lightly, is itself an affront to society. Though the award of maximum punishment may depend on the circumstances of the case, the award of the minimum punishment, generally, is imperative. The provisos to Section 376(1) and 376(2) I.P.C. give the power to the court to award a sentence lesser than the minimum for adequate and special reasons. The power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases where special facts and circumstances

justify a reduction. The reasons must be relevant to the exercise of such discretion vested in the court. The reasons must be set out clearly and cogently. The mere existence of a discretion by itself does not justify its exercise. The long pendency of the criminal trial or the offer of the rapist to marry the victim are not relevant reasons. Nor is the age of the offender by itself an adequate reason.

> 12. The punishments prescribed by the Penal Code reflect the legislative recognition of the social needs, the gravity of the concerned offence, its impact on the society and what the legislature considers as a punishment suitable for the particular offence. It is necessary for the courts to imbibe that legislative wisdom and to respect it."

17. In State of Karnataka vs. Krishnappa (2000) 4 SCC 75, a three-Judge Bench of this Court held that the socio-economic status, religion, race, caste or creed of the accused are irrelevant considerations in the sentencing policy. It was further held:

> "18. The High Court however, differed with the reasoning of the Trial Court in the matter of sentence and as already noticed, the reasons given by the High Court are wholly unsatisfactory and even irrelevant. We are at a loss to understand how the High Court considered that the "discretion had not been properly exercised by the Trial Court". There is no warrant for such an observation. The High Court justified the reduction of sentence on the ground that the accused respondent was "unsophisticated and illiterate citizen belonging to a weaker section of the society" that he was "a chronic addict to drinking" and had committed rape on the girl while in state of "intoxication" and that his family comprising of "an old mother, wife and children" were dependent upon him. These factors, in our opinion did not justify recourse to the proviso to Section 376(2) IPC to impose a sentence less than the prescribed minimum. These reasons are neither special nor adequate. 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. 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 circumstance 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 heinous crimes 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 to the respondent. To show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced. The High Court in the facts and circumstances of the case, was not justified in interfering with the discretion exercised by the Trial Court and our answer to the question posed in the earlier part of the judgment is an emphatic - No."

18. Similar view point was largely adopted in various cases, like in Bhupinder Sharma vs. State of Himachal Pradesh (2003) 8 SCC 551; State of M.P. vs. Balu (2005) 1 SCC 108; State of Madhya Pradesh vs. Bablu Natt (2009) 2 SCC 272; and State of Rajasthan vs. Vinod Kumar (2012) 6 SCC 770.

19. At this juncture, it is pertinent to refer two decisions on the very same Section, i.e., Section 376 IPC wherein while considering peculiar circumstances, this Court reduced the prescribed minimum sentence and confirmed the orders passed by the High Court. In Baldev Singh and Others vs. State of Punjab (2011) 13 SCC 705, though courts below awarded a sentence of ten years, taking note of the facts that the occurrence was 14 years old, the appellants therein had undergone about 3 ½ years of imprisonment, the prosecutrix and the appellants married (not to each other) and entered into a compromise, this Court, while considering peculiar circumstances, reduced the sentence to the period already undergone, but enhanced the fine from Rs. 1,000/- to Rs. 50,000/-. In the light of series of decisions, taking contrary view, we hold that the said decision in Baldev Singh (supra) cannot be cited as a precedent and it should be confined to that case.

20. Similarly, in Mohd. Imran Khan vs. State Government (NCT of Delhi) (2011) 10 SCC 192, this Court, after pointing out that as the High Court itself has awarded the sentence lesser than the minimum prescribed for the offence recording special reasons, viz., that the prosecutrix therein had willingly accompanied the appellants to Meerut and stayed with them in the hotel; she was more than 15 years of age when she eloped with the appellants and the appellants were young boys held that there is no case for further reduction of sentence and dismissed the appeals filed by the appellants-accused. Inasmuch as the prosecutrix herself had consented and stayed along with the appellants-accused in the hotel, the High Court reduced the

sentence to five years which was less than the minimum prescribed for the offence which in turn affirmed by this Court. This decision is also confined to the peculiar circumstances under the important aspect that the prosecutrix was a consenting party, hence, the same is also not applicable to the case on hand or any other case.

21. Thus, the law on the issue can be summarized to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim or the long pendency of the criminal trial or offer of the rapist to marry the victim or the victim is married and settled in life cannot be construed as special factors for reducing the sentence prescribed by the statute. The power under the proviso should not be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation.

22. Further, a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurized by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurize her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the Court to exercise the discretionary power under the proviso of Section 376(2) of IPC.

23. It is imperative to mention that the legislature through the Criminal Law (Amendment) Act, 2013 has deleted this proviso in the wake of increasing crimes against women. Though, the said amendment will not come in the way of exercising discretion in this case, on perusal of the above legislative provision and catena of cases on the issue, we feel that the present case fails to fall within the ambit of exceptional case where the Court shall use its extraordinary discretion to reduce the period of sentence than the minimum prescribed.

24. This is yet another opportunity to inform the subordinate Courts and the High Courts that despite stringent provisions for rape under Section 376 IPC, many Courts in the past have taken a softer view while awarding sentence for such a heinous crime. This Court has in the past noticed that few subordinate and High

Courts have reduced the sentence of the accused to the period already undergone to suffice as the punishment, by taking aid of the proviso to Section 376(2) IPC. The above trend exhibits stark insensitivity to the need for proportionate punishments to be imposed in such cases.

25. In the light of the above discussion, we reject the request of learned counsel for the appellants for reduction of sentence, consequently, the appeals fail and the same are dismissed.