STATE OF MADHYA PRADESH

v.

BABBU BARKARE @ DALAP SINGH

MAY 13, 2005

[ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Sentencing—Determination of—Offence of rape—Conviction—Punishment of 7 years by trial Court—Reduced by High Court—Permissibility of—Held: While determining the sentence, the facts of each case, nature of crime, the manner in which it was planned or committed, the motive, conduct of the accused, nature of weapons used and other attending circumstances are relevant—Undue sympathy to impose inadequate sentence would do more harm to the justice system—Principle of proportionality should be adopted—In rape cases, if the Court does not mention adequate and special reasons, a sentence lesser than the prescribed minimum u/s 376(1) and (2) cannot be awarded—The reason given for reducing the sentence in the present case is neither adequate nor special—Matter remitted to High Court on the question of sentence—Penal Code, 1860—Section 376.

Words and Phrases:

'Rape'—Meaning of in the context of Penal Code, 1860.

In the present case, sentence of imprisonment of 7 years, imposed by trial Court for the offence punishable u/s 376 IPC, was reduced to already undergone i.e. 11 months by High Court on the ground that the accused was an illiterate labourer.

In appeal to this Court, appellant-State contended that while dealing with the offence of rape which was established, reduction of sentence should not have been ordered on the specious reasonings.

Disposing of the appeal, the Court

HELD: 1.1. In both sub-sections (1) and (2) of Section 376 IPC minimum sentences are prescribed. Both in cases of sub-sections (1) and (2) the Court has the discretion to impose a sentence of imprisonment less

A than the prescribed minimum for 'adequate and special reasons'. If the Court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum. [390-D-E]

1.2. In order to exercise the discretion of reducing the sentence the statutory requirement is that the Court has to record "adequate and B special reasons" in the judgment and not fanciful reasons which would permit the Court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no strait-jacket formula can be indicated. What is applicable to trial Courts regarding recording C reasons for a departure from minimum sentence is equally applicable to the High Court. The only reason indicated by the High Court is that the accused belonged to rural areas. The same can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative. [390-F, G]

D 2.1. 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 E the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. [387-D-E]

Mahesh v. *State of M.P.*, [1987] 2 SCR 710, relied on.

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

2.2. 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 G 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. [387-G-H; 388-F]

Sevaka Perumal etc. v. *State of Tamil Nadu,* AIR (1991) SC 1463, relied on.

H

2.3. 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. [388-B, C]

2.4. 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. 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 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. [388-F-H; 389-A]

Dennis Councle MCG Dautha v. *State of Callifornia,* 402 US 183, referred to.

2.5. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of, and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of

A **time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. [389-D, E]**

Jashubha Bharatsinh Gohil **v.** *State of Gujarat,* **[1994] 4 SCC 353;** B *Dhananjoy Chatterjee* **v.** *State of W.B.,* **[1994] 2 SCC 220;** *Ravji* **v.** *State of Rajasthan,* **[1996] 2 SCC 175 and** *State of M.P.* **v.** *Ghanshyam Singh,* **[2003] 8 SCC 13, relied on.**

3. Since, as per the accused, the High Court has not noted several C **other mitigating factors which were placed for consideration and granted relief on the indicated reasons, the matter is remitted to the High Court to hear it only relating to sentence. [391-A; 390-H]**

4. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud, or as 'the carnal D **knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will or as expressed more fully', rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will'. The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter** E **cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape. In the crime of rape, 'carnal knowledge' means the penetration to the slightest degree of the organ alleged to have been carnally known by the male organ of generation. Even the slightest degree of penetration is sufficient to prove sexual intercourse.** F **It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order. [386-D-E]**

Co. Litt. 123-b and Hale PC **628, referred to.**

G *Stephen's "Criminal Law"* **9th Ed. P.262;** *Encyclopedia of Crime and Justice'* **Vol. 4 p.1356;** *Halsbury's Statutes of England and Wales* **(Fourth Edition) Vol. 12, referred to**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 738 of 2005.

H

From the Judgment and Order dated 2.5.2003 of the Madhya Pradesh

High Court in Crl.A. No. 320 of 2003. A

C.D. Singh, R.K. Singh, Ms. Kiran Suvarna and Sanjay Kumar Singh for the Appellants.

C.L. Sahu for the Respondent.

B

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Leave granted.

Since the only question involved in this Appeal is whether learned Single Judge was right in reducing the sentence as imposed by the trial court C on respondent, detailed reference to the factual aspects is unnecessary.

The respondent faced trial for alleged commission of offences punishable under Section 376 of the Indian Penal Code, 1860 (in short the 'IPC') The respondent- accused Babbu was sentenced to undergo rigorous imprisonment for a period of seven years with a fine of Rs.2,000/- with default stipulation. D The conviction was recorded by learned Third Sessions Judge, Betul who imposed the aforesaid sentences. The respondent-accused preferred an appeal (Crl. Appeal No. 320/2003) in the High Court of Madhya Pradesh. By the impugned judgment, the High Court directed the sentence to be reduced to the period already undergone. It noted that the learned counsel for the accused person who was the appellant before the High Court did not challenge the E finding of conviction but only prayed for reduction in sentence. The High Court noticed that respondent-accused had undergone sentence of imprisonment for a period of about eleven months. The only ground recorded for reducing the sentence was that the accused person was an illiterate labourer aged about 20 years at the time of commission of offence. That appeared to F be a just and proper ground to the learned Single Judge to reduce the sentence to the period already undergone.

In support of the appeal, learned counsel for the appellant-State submitted that the reduction of sentence as done by learned Single Judge is contrary to law as laid down by this Court in several cases. While dealing with the G offence of rape which was established, the direction for reduction of sentence should not have been given on the specious reasonings indicated above.

Learned counsel appearing for the respondent submitted that after considering the relevant aspects the learned Single Judge had directed reduction H

A in sentence restricting it to the period already undergone. This Court should not interfere in the matter particularly under Article 136 of the Constitution of India, 1950 (in short the 'Constitution').

The crucial question which needs to be decided is the proper sentence and acceptability of reasons which weighed with learned Single Judge. It is B to be noted that the sentences prescribed for offences relatable to Section 376 are imprisonment for life or up to a period of 10 years.

The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Sections 375, 376, 376-A, 376-B, 376- C C, and 376-D. 'Rape' is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, i.e. 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects D the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-b); or as expressed more fully,' rape is the carnal knowledge of any woman, above the age of particular years, against E her will; or of a woman child, under that age, with or against her will' (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon.6, 1a, 9 Edw. 4, 26 a (Hale PC 628). In the crime of rape, 'carnal knowledge' F means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's "Criminal Law" 9th Ed. p.262). In 'Encyclopedia of Crime and Justice' (Volume 4, page 1356) it is stated ".....even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient G to prove sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

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 H

the deep sense of some deathless shame. The offender robs the victim of her most valuable and priceless possession that is dignity.

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 ehallenges 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. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organized crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In *Mahesh* v. *State of M.P.*, [1987] 2 SCR 710, this Court while refusing to reduce the death sentence observed thus:

> "It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."

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

A or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal etc.* v. *State of Tamil Nadu,* AIR (1991) SC 1463.

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 B 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 C 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.

Proportion between crime and punishment is a goal respected in D 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 E 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.

F 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 balancing is indeed a difficult task. It has been very aptly indicated in *Dennis* G *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 criteria to correctly assess various circumstances germane to the H

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. A

In *Jashubha Bharatsinh Gohil* v. *State of Gujarat,* [1994] 4 SCC 353, it has been held by this Court that in the matter of death sentence, the Courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal in achieving the avowed object to law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue. B C

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. D E

In *Dhananjoy Chatterjee* v. *State of W.B.* (1994 (2) SCC 220), this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. F G

Similar view has also been expressed in *Ravji* v. *State of Rajasthan,* [1996] 2 SCC 175. It has been held in the said case that it is the nature and H

A gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with
B the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will
C lose its relevance.

These aspects have been elaborated in *State of M.P.* v. *Ghanshyam Singh,* [2003] 8 SCC 13.

In both sub-sections (1) and (2) of Section 376 minimum sentences are
D prescribed.

Both in cases of sub-sections (1) and (2) the Court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for 'adequate and special reasons'. If the Court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the
E prescribed minimum.

In order to exercise the discretion of reducing the sentence the statutory requirement is that the Court has to record "adequate and special reasons" in the judgment and not fanciful reasons which would permit the Court to impose a sentence less than the prescribed minimum. The reason has not only
F to be adequate but also special. What is adequate and special would depend upon several factors and no *strait-jacket* formula can be indicated. What is applicable to trial Courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. The only reason indicated by the High Court is that the accused belonged to rural areas. The
G same can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative.

Considering the legal position as indicated above the High Court's order is clearly unsustainable and is accordingly set aside.

H We remit the matter to the High Court to hear the matter only relating

to sentence. Normally, in view of the established law on the subject we would have closed the matter. But learned counsel for the accused submitted that the High Court has not noted several other mitigating factors which were placed for consideration and granted relief on the indicated reasons. The High Court shall consider factors to be placed for consideration and decide the question of sentence keeping in view the principles indicated above. A B

The appeal is accordingly disposed of.

K.K.T. Appeal disposed of.