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Court : Rajasthan Jodhpur

Decided On : Feb-19-2015

Judge : Gopal Krishan Vyas & Anupinder Singh Grewal

Appeal No. : Cr. Appeal No. 724 of 2005

Appellant : Devan Das

Respondent : State of Rajasthan

Judgement :

The instant criminal appeal has been filed by the appellant Devan Das S/o Nathumal, resident of Pali under Section 374(2) Cr.P.C. to challenge the judgment of conviction and sentence dated 12.8.2005 whereby the Addl. Sessions Judge (Fast Track) No.2, Pali convicted the accused appellant for offence under Sections 376, 363, 323 and 324 IPC and passed the following sentence against him:

Under Section 376 IPC	Life imprisonment and Rs.1000/- of fine and in default of payment of fine to further undergo 3 years SI.
Under Section 363 IPC	3 years RI and a fine of Rs.500/- and in default of payment of fine to further undergo 6 months SI.

Under Section 324 IPC	1 years RI and to pay a fine of Rs.500/- and in default of payment of fine to further undergo 3 months SI.
Under Section 323 IPC	6 months SI and a fine of Rs.250/- and in default of payment of fine to further undergo 1 months SI.

As per the facts of the case an FIR was lodged by the complainant Ramesh Kumar, father of the prosecutrix, who was six years old on 14.12.2004 at about 1.00 a.m. In the Police Station (Mahila), Pali alleging therein that his daughter aged about 6 years gone to the house of his neighbor to attend marriage programme at about 7 to 7.30 p.m. but she did not come back and upon inquiry it was informed by the neighbors that your daughter returned at about 8.00 p.m., during search his daughter found near temple of Hanumanji and cremation place in very critical condition. The lower part of the body of his daughter was sustained with the blood due to rape committed by unknown person. It is stated in the FIR that due to the serious condition of the body and upon the fact that blood was coming out from the private part of his daughter, the complainant and his wife immediately brought her to the hospital for treatment. The SHO, Police Station (Mahila), Pali registered the FIR No.127 dated 14.12.2004 against unknown person under Section 376, 363, 323 and 324 IPC and commenced investigation. In the investigation the statement of prosecutrix PW-2 Chandani were recorded in which it was alleged that appellant committed rape with her. The investigating officer after making intensive investigation, arrested the accused appellant for committing offence under Section 376, 363, 323 and 324 IPC and after completion of investigation filed charge-sheet against him in the court of Chief Judicial Magistrate, Pali for aforesaid offences from where the case was committed to the District and Sessions Judge, Pali, but later on transferred to the court of Addl. District and Sessions Judge (Fast Track) No.2, Pali for trial. In the trial, after framing charge against the accused appellant under Section 376, 363, 323 and 324 IPC the statement of 17 prosecution witnesses were recorded including the statement of prosecutrix PW-2 Baby C and author of the FIR PW-1 Ramesh and

PW-3 Gyatri. All these witnesses categorically proved the allegation of rape and assault against the accused appellant for commission of aforesaid offence. The PW-6 Dr. V.K. Mahalotra and PW-7 Dr. Jai Shree Sharma after medically examined the prosecutrix gave opinion that rape has been committed with the prosecutrix who was 6 years at the time of incident took place.

The learned trial court granted an opportunity to the accused appellant to lead his evidence after recording his statement under Section 313 Cr.P.C. and in defense two witness DW-1 Asan Das and DW-2 Prakash Sirwani were produced before the Court, but the learned trial court after hearing both the parties finally convicted the accused appellant for offence aforesaid.

In this appeal filed by the appellant, the appellant is challenging the validity of the judgment.

At the threshold the learned counsel for the appellant submits that the appellant is not challenging the finding of conviction against the accused appellant for offence under Section 376, 363, 323 and 324 IPC but submit that in view of the judgments of the Hon'ble Supreme Court in the case of Dinesh @ Buddha Vs. State of Rajasthan reported in 2006 Cr.L.R. (SC) 209 and Suil Dutt Sharma Vs. State (Govt. of NCT of Delhi) reported in (2014) 4 SCC 375 the sentence awarded to the appellant may be reduced to 10 years. Further, it is submitted that the accused appellant is behind the bars since 2005, therefore, while reducing the sentence awarded to him from life imprisonment to 10 years, he may be released.

Per contra, the learned Public Prosecutor opposed the prayer and submits that looking to the seriousness of the case no lenient view is required to be taken against the accused appellant because a innocent girl of 6 years was not only raped by the appellant but injuries were caused to her and prosecution has proved its case beyond reasonable doubt, therefore, the appeal filed by the appellant may be dismissed because it is a rarest of rare case in which rape is committed with the small girl of 6 years of age, therefore, this appeal, may be dismissed.

After hearing the learned counsel for the parties we have perused the entire evidence and the judgments of the Hon'ble Supreme Court cited by the learned

counsel for the appellant in the case of Dinesh @ Buddha (supra). In the said case, the Hon'ble Supreme Court gave following verdict in para no.13 which reads as under:

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

The Hon'ble Supreme Court while giving aforesaid finding passed the following order in para no.16 of the above judgment:

16. In view of the finding that Section 3(2)(v) of the Atrocities Act is not applicable, the sentence provided in Section 376(2)(f) IPC does not per se become life sentence. Though learned counsel for the State submitted that even in a case covered under Section 376(2)(f) IPC, imprisonment for life can be awarded, it is to be noted that minimum sentence of 10 years has been statutorily provided and considering the attendant circumstances the imprisonment for life in a given case is permissible. Neither the Trial Court nor the High Court has indicated any such factor. Only by applying Section 3(2)(v) of the Atrocities Act the life sentence was awarded. Therefore, the sentence is reduced to 10 years. The other question is

legality of the compensation awarded. Since the State has not challenged the award of compensation, it is not open to it to question the legality of the award in the present appeal filed by the accused. Therefore, State's challenge to the legality and/or quantum of compensation awarded is without merit. The amount shall be paid to the victim if not already paid within a period of eight weeks.

In the case of Sunil Dutt Sharma (*supra*), the Hon'ble Supreme Court reduced the sentence but that case was not related with offence under Section 376 IPC, which is evident from the final adjudication made in para no.14 of the judgment, which reads as under:

14. Applying the above parameters to the facts of the present case it transpires that the death of the wife of the accused-appellant occurred within two years of marriage. There was, of course, a demand for dowry and there is evidence of cruelty or harassment. The autopsy report of the deceased showed external marks of injuries but the cause of death of deceased was stated to be due to asphyxia resulting from strangulation. In view of the aforesaid finding of Dr. L.T. Ramani (PW-16) who had conducted the postmortem, the learned Trial Judge thought it proper to acquit the accused of the offence under Section 302 of the Penal Code on the benefit of doubt as there was no evidence that the accused was, in any way, involved with the strangulation of the deceased. The proved facts on the basis of which offence under Section 304-B of the Penal Code was held to be established, while acquitting the accused-appellant of the offence under Section 302 of the Penal Code, does not disclose any extraordinary, perverse or diabolic act on the part of the accused-appellant to take an extreme view of the matter. Coupled with the above, at the time of commission of the offence, the accused-appellant was about 21 years old and as on date he is about 42 years. The accused-appellant also has a son who was an infant at the time of the occurrence. He has no previous record of crime. On a cumulative application of the principles that would be relevant to adjudge the crime and the criminal test, we are of the view that the present is not a case where the maximum punishment of life imprisonment ought to have been awarded to the accused-appellant. At the same time, from the order of the learned Trial Court, it is clear that some of the injuries on the deceased, though obviously not the fatal injuries, are attributable to the

accused-appellant. In fact, the finding of the learned Trial Court is that the injuries No. 1 (Laceration 1 x skin deep on the side of forehead near hair margin) and 2 (Laceration 1 x 1 scalp deep over the frontal area) on the deceased had been caused by the accused-appellant with a pestle. The said part of the order of the learned Trial Court has not been challenged in the appeal before the High Court. Taking into account the said fact, we are of the view that in the present case the minimum sentence prescribed i.e. seven years would also not meet the ends of justice. Rather we are of the view that a sentence of ten years RI would be appropriate. Consequently, we modify the impugned order dated 4.4.2011 passed by the High Court of Delhi and impose the punishment of ten years RI on the accused-appellant for the commission of the offence under Section 304-B of the Penal Code. The sentence of fine is maintained. The accused-appellant who is presently in custody shall serve out the remaining part of the sentence in terms of the present order.

We have considered the argument of the learned counsel for the appellant to reduce the sentence and examined the evidence on record, so also, considered the judgment directly on the point in the case of State of Rajasthan Vs. Vinod Kumar decided by the Hon'ble Supreme Court on 18.5.2014 in Cr. Appeal No.1887/2008.

Admittedly, the day on which the offence under Section 376 IPC was committed by the accused-appellant, the prosecutrix was 6 years of age and before the Court it is specifically said by the prosecutrix PW-2 that accused appellant committed rape with her. In the examination-in-chief PW-2 Baby C said thus:

Hindi

In the cross-examination, the said child witness categorically proved that rape was committed with her by the accused appellant and the allegation of rape is corroborated by the doctors PW-6 Dr. V.K. Mahotra and PW-7 Dr. Jai Shree Sharma, therefore, we are of the opinion that very heinous offence has been committed by the accused appellant for which no lenient view can be taken against the accused appellant. It is true that certain observations are made by the Hon'ble Supreme Court in the case of Dinesh @ Buddha (supra) but upon perusal

of the aforesaid adjudication it is revealed that there is no mandate to reduce sentence in all the cases where rape is committed with the girl under 12 years of age. The facts and evidence of each and every case are required to be taken into account for the purpose of adequate punishment to the accused appellant. In our opinion, in the present case, the evidence produced by the prosecution and statement of prosecutrix loudly speaks that no error has been committed by the learned trial court in punishing the accused appellant for life imprisonment for offence committed by him under Section 376 IPC alongwith other offences.

In the case of Vinod Kumar (supra) the Hon'ble Supreme Court observed in para no.19 and 20, which reads as under:

"19. Awarding punishment lesser than the minimum prescribed under Section 376 IPC, is an exception to the general rule. Exception clause is to be invoked only in exceptional circumstances where the conditions incorporated in the exception clause itself exist. It is a settled legal proposition that exception clause is always required to be strictly interpreted even if there is a hardship to any individual. Exception is provided with the object of taking it out of the scope of the basic law and what is included in it and what legislature desired to be excluded. The natural presumption in law is that but for the proviso, the enacting part of the Section would have included the subject matter of the proviso, the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and a construction which would make the exceptions unnecessary and redundant should be avoided. Proviso is used to remove special cases from the general enactment and provide for them separately. Proviso may change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable. (Vide: S. Sundaram Pillai, etc. v. V.R. Pattabiraman, AIR 1985 SC 582; Union of India and Ors. v. M/s. Wood Papers Ltd. and Anr., AIR 1991 SC 2049; Grasim Industries Ltd. and Anr. v. State of Madhya Pradesh and Anr., AIR 2000 SC 66; Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr., AIR 2003 SC 3502; Project Officer, ITDP and Ors. v. P.D. Chacko, AIR 2010 SC 2626; and Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal and Ors., (2011) 1 SCC 236).

20. 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 are not the relevant factors for determining the quantum of punishment. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused and age of the sexually assaulted victim and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case. The power under the proviso is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation. The legislature introduced the imposition of minimum sentence by amendment in the IPC w.e.f. 25.12.1983, therefore, the courts are bound to bear in mind the effect thereof.

The court while exercising the discretion in the exception clause has to record exceptional reasons for resorting to the proviso. Recording of such reasons is sine qua non for granting the extraordinary relief. What is adequate and special would depend upon several factors and no straight jacket formula can be laid down.

After perusing the aforesaid adjudication made by the Hon'ble Supreme Court and evidence on record, we are of the opinion that there is no such reason in existence to reduce the sentence of life imprisonment awarded by the learned trial court. More so, the conduct of the accused appellant for committing offence with the child of 6 years can be defined as heinous offence for which the sentence of life imprisonment can be only punishment because due to such offence not only the atmosphere of society is destroyed but also the life of child is spoiled.

In view of the above, this cr. appeal is hereby dismissed.

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