

State Vs. Sunil Gupta

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Court : Delhi

Decided On : May-26-2011

Acts : Indian Penal Code (IPC) - Sections 354, 376, 511, 377, 448; Code of Criminal Procedure (CrPC) (CRPC) - Section 313

Appeal No. : CRL.A. No. 457/2011

Appellant : State

Respondent : Sunil Gupta

Advocate for Def. : Mr.G.D. Sharma, Adv.

Advocate for Pet/Ap. : Mr.Lovkesh Sawhney, Adv.

Judgement :

1. This leave petition was filed by the State against the Judgment dated 25.03.2010 passed by the learned Additional Sessions Judge whereby the Respondent Sunil Gupta was held guilty for the offence punishable under Section 354 Indian Penal Code (IPC) instead of the offence punishable under Section 376/511 IPC (for which he was charged) and was sentenced to undergo rigorous imprisonment for three months and to pay a fine of ` 2,000/-. In default of payment of fine the Respondent was required to undergo further simple imprisonment for fifteen days.

2. By order dated 01.04.2011 this Court came to the conclusion that the offence under Section 376/511 IPC was not made out and that the Respondent was rightly convicted under Section 354 IPC. This Court was prima facie of the view that the matter required to be examined on the question of sentence awarded to the Respondent. The leave petition was allowed to this extent only.

3. Facts of the case can be extracted from para 1 to 3 of the impugned judgment as under:

"Parmatma and Renu are residing at H.No.982, S-Block, Mangolpuri, Delhi and are having three sons and one daughter "K". Sunil Gupta is the son of brother of Renu in distant relation. Renu used to treat Sunil Gupta as her nephew. Sunil Gupta was residing at S-1026, Mangolpuri, Ashok, brother of Sunil Gupta, was residing at the first floor of the said house alongwith his family. Renu, on 20.10.2007 at about 7.00 p.m. was present at her house alongwith her daughter "K" and other children. Sunil Gupta came to the house of Renu under the influence of liquor and demanded money for liquor but Renu refused to give money as the Sunil Gupta was already under the influence of liquor. Renu took Sunil Gupta to drop back him to his house. At that time, "K" also followed her mother Renu. Renu went upstairs at the house of Sunil Gupta to meet sister in law of Sunil Gupta. Sunil Gupta took "K" inside the room situated at ground floor and bolted the room from inside. Renu came down after five minutes after meeting sister in law of Sunil Gupta. Renu heard the noise of her daughter "K" from the room of Sunil Gupta.

Sunil Gupta had removed the clothes of "K" after taking her inside the room and put oil on her body. Renu after hearing the cries of "K" knocked the door of the room but Sunil Gupta did not open the door. Thereafter, Renu went inside the room from another door. Sunil Gupta after wearing his underwear ran away from the spot. "K" was found not wearing any clothes at that

time. Renu also noticed oil on the entire body of "K". Renu narrated the entire facts to her husband Parmatma. Sunil Gupta could not be traced. Renu and Parmatma on 01.02.2008 had gone to vegetable market, where Sunil Gupta was found to be present in the vegetable market. The Parmatma caught hold of Sunil Gupta and took her to police post. Ct. Jitender recorded DD No.24 regarding attempt to commit rape by Sunil Gupta on "K". Ct.Jitender had informed Incharge of Police post and SHO Mangolpuri. The investigation was assigned to W/ASI Nirmala. ASI Nirmala recorded the statement of Renu. "K" was sent for medical examination to BJRM Hospital (hereinafter referred to as prosecutrix) where Renu refused for conduction of internal examination of "K". Rukka was prepared. FIR bearing No.62/08 u/s 376/511 IPC was registered.

4. In order to establish its case the prosecution examined seven witnesses. PW-2 Smt. Renu is the mother of the prosecutrix who corroborated the prosecution version as set out earlier.

5. PW-3 baby "K" is the prosecutrix. She was examined after putting questions to her to ascertain that she was mature enough to understand the questions and give intelligible answers. She deposed as under:

"I know the accused today present in the Court as he was residing in my neighbourhood. He was residing on the ground floor of his house. I used to call accused as bhaiya. Accused offered some money to me and on that pretext, he removed all my clothes after taking me inside his room. Accused put oil on my whole body. I cannot tell the date and month, when accused put oil on my body but I was studying in class 2nd at that time."

6. Evidence of PW-4 Parmatma (father of the prosecutrix) is in the nature of hearsay evidence as whatever was observed by PW-2 Renu, his wife, was narrated to him (PW-4) by PW-2.

7. In his examination under Section 313 Cr.P.C. the Respondent stated that he was falsely implicated in the case due to some money dispute. The Respondent also examined DW-1 Bajrangi in support of his defence who deposed that the complainant and the accused had cordial relations. There was some dealing of money between them. No incident took place on 20/21.10.2007. The Respondent was falsely implicated in the case.

8. We have heard Mr.Lovkesh Sawhney learned APP for the State and Mr.G.D.Sharma learned counsel for the Respondent and have perused the record.

9. It is argued by the learned APP that the Respondent was just short of committing the offence of rape as the Respondent had already applied oil on the entire body and urinary organ of the prosecutrix. It was only on account of the timely arrival of PW-2 Renu that he was not able to commit the offence of rape as she entered the room of Respondent after she looked for the prosecutrix, and found the prosecutrix naked on the bed and the appellant also standing naked. It is pleaded that in the circumstances, the Respondent ought to have been awarded the maximum sentence provided under Section 354 IPC. The Respondent did not deserve any leniency.

10. On the other hand it is submitted by the learned counsel for the Respondent that the Respondent was falsely implicated in the case because of some money dispute between PW-2 Renu (mother of the prosecutrix) and the Respondent. There was unexplained delay of about four months in lodging the FIR and in the circumstances the testimony of the prosecutrix and her mother Renu was not sufficient to hold the Respondent guilty of the offence punishable under Section 354 IPC. In the alternative it is urged that even if it is proved that the Respondent was guilty of the offence punishable under Section 354 IPC there were mitigating circumstances taken into consideration by the Trial Court as reformative measure. The High Court in the circumstances ought not to interfere with the discretion exercised by the Trial Court in awarding the sentence of three months of rigorous imprisonment and fine.

11. Section 377 IPC entitles the State to file an appeal in a case of conviction on a trial held by any Court against the sentence on the ground of its inadequacy.

Section 377 (3) enjoins the Court not to enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause the accused is entitled to plead for his acquittal or for the reduction of the sentence.

12. According to the prosecution, this incident took place on 20.10.2007 and the FIR in this case was lodged on 01.02.2008. Thus there is a delay of about three months and ten days in lodging the FIR. PW-2 was cross-examined on the question of delay in lodging a report with the police. PW-2 Renu deposed that she did not lodge the report on 20.10.2007 as she wanted to save prestige of her daughter and she thought that whenever the accused would meet her she would talk to him. It may be noticed that on 20.10.2007 when PW-2 Smt.Renu got down from the first floor, after meeting the bhabi of the Respondent, she looked for her daughter (the prosecutrix) when she heard her cries. PW-2 knocked the door of the Respondent's room. The Respondent did not open the door. PW-2 Renu therefore went to the other door and knocked thereon. According to PW-2 the Respondent then opened the first door and after wearing his underwear ran away. She noticed that the prosecutrix was not wearing any clothes at that time. She found oil on the whole body of her daughter. PW-2 Renu also stated that they tried to trace the Respondent but he was not traceable. It was only on 01.02.2008 when she alongwith her husband was present in the vegetable market that the Respondent was noticed. She caught hold of the Respondent and took him to the police post. In the cross-examination, the witness again stated that she did not lodge the report prior to 01.02.2008 as she wanted to save the prestige of her daughter and thought that whenever she would meet the Respondent she would talk to him.

13. PW-2 Renu (mother of the prosecutrix) and PW-3 (the prosecutrix), who at the time of the commission of the offence was only about six and a half years old, did not level any allegations of rape nor the prosecutrix was medically examined internally. If PW-2 wanted to implicate the Respondent falsely she could very well state that the incident took place on the previous day or on the same day in the morning but she wanted to come out with the truth and therefore gave the date i.e. 20.10.2007 when the offence was committed by the Respondent.

14. A suggestion was put to PW-2 in the cross-examination that there was money dealing between her and the Respondent which of course was denied by her. Similarly DW-1 Bajrangi also deposed that on two or three occasions there was exchange of money between the accused and the complainant in his presence. It may be noticed that no specific suggestion was given to PW-2 Smt.Renu as to how much amount was loaned to her and when she was expected to return the money to the Respondent, so as to give an opportunity to the Respondent to visit Renu asking her to return the money given. The defence evidence produced in this regard is also vague. Respondent has failed to show even by preponderance of probability or even by creating a doubt in the prosecution case that any money was lent by the Respondent to the mother of the prosecutrix or that there was any dispute over the same leading to false implication. It is highly improbable that the mother would put the prestige of her small daughter at stake by levelling false allegations of sexual molestation simply because of some small amount of money.

15. The delay in recording the FIR in the case of sexual assault has to be appreciated and analysed on a different footing than in any other offence. In the cases of sexual assault the tendency of the prosecutrix and her relations is to somehow not approach the police and the court but to find out some other solution. The delay in a case of sexual assault cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and the family members before coming to the police station to lodge a complaint in a case of sexual assault. In this case also the mother of the prosecutrix initially wanted to speak to the Respondent who fled away from the spot and it was only when he was found present in the vegetable market that he was caught and taken to the police post. In *Satpal Singh v. State of Haryana*, (2010) 8 SCC 714 while relying on *Karnel Singh v.State of M.P.* (1995) 5 SCC 518 the Supreme Court held as under:

In a rape case the prosecutrix remains worried about her future. She remains in a traumatic state of mind. The family of the victim generally shows reluctance to go to the police station because of society's attitude towards such a woman. It casts doubts and shame upon her rather than comfort and sympathise with her. Family remains concern about its honour and reputation of the prosecutrix. After only

having a cool thought it is possible for the family to lodge a complaint in sexual offences.

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In case of sexual offences, the criteria may be different altogether. As honour of the family is involved, its members have to decide whether to take the matter to the court or not. In such a fact- situation, near relations of the prosecutrix may take time as to what course of action should be adopted. Thus, delay is bound to occur. This Court has always taken judicial notice of the fact that **"ordinarily the family of the victim would not intent to get a stigma attached to the victim. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon"** vide *Satyapal v.State of Haryana*, (2009) 6 SCC 635.

16. In view of the above discussion there is no manner of doubt that the Trial Court rightly convicted the Respondent for the offence punishable under Section 354 IPC.

17. There was a shift in sentencing policy with the enactment of the Criminal Procedure Code 1973. An accused person after he was held guilty for the offence triable by a Court of Sessions or in a warrant case by a Magistrate was given a statutory right to be heard on the question of sentence which may be commensurate with the offence proved against him and which may be awarded to him. In *Mohammad Giasuddin v.State of Andhra Pradesh*, 1977 (3) SCC 287 the Supreme Court held as follows:

"The new Criminal Procedure Code, 1973, incorporates some of these ideas and gives an opportunity in Section 248(2) to both parties to bring to the notice of the Court facts and circumstances which will help personalise the sentence from a reformatory angle. This Court, in *Santa Singh v. State of Punjab*, 1976 (4) SCC 190, has emphasised how fundamental it is to put such provision to dynamic judicial use, while dealing with the analogous provisions in Section 235(2):

"This new provision in Section 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code. It was realised that sentencing is an important stage in the process of administration of criminal justice as important as the adjudication of guilt and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the Court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the Court. Modern penology regards crime and criminal as equally material when the right sentence has to be picked out. It turns the focus not only on the crime, but also on the criminal and seeks to personalise the punishment so that the reformist component is as much operative as the deterrent element. It is necessary for this purpose that facts of a social and personal nature, sometimes altogether irrelevant if not injurious, at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined. A proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances extenuating or aggravating of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental conditions of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These factors have to be taken into account by the Court in deciding upon the appropriate sentence.

The hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the Court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. Of course, care would have to be taken by the Court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings."

It will thus be seen that there is a great discretion vested in the Judge, especially when pluralistic factors enter his calculations. Even so, the Judge must exercise this discretionary power, drawing his inspiration from the humanitarian spirit of the law, and living down the traditional precedents which have winked at the personality of the crime-doer and been swept away by the features of the crime. What is dated has to be discarded. What is current has to be incorporated. Therefore innovation, in all conscience, is in the field of judicial discretion.

Unfortunately, the Indian Penal Code still lingers in the somewhat compartmentalised system of punishment viz. imprisonment, simple or rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfil his tryst with curing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category,

engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing Judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be.

Sentencing justice is a facet of social justice, even as redemption of a crime-doer is an aspect of restoration of a whole personality. Till the new Code recognised statutorily that punishment required considerations beyond the nature of the crime and circumstances surrounding the crime and provided a second stage for bringing in such additional materials, the Indian Courts had, by and large, assigned an obsolescent backseat to the sophisticated judgment on sentencing. Now this judicial skill has to come of age."

18. The learned counsel for the Appellant has relied upon *Vidyadharan v. State of Kerala* (2004) 1 SCC 215 where the Supreme Court declined to interfere in the sentence of three months awarded for the offence punishable under Section 354 and 448 IPC. In the *State of Karnataka v. Puttaraja*, (2004) 1 SCC 475 the Supreme Court while referring to Friedman in his "Law in Changing Society" observed that in operating the sentencing system, law should adopt the corrective machinery or the deterrence ideology based on factual matrix. The Supreme Court held as under:

"The law regulates social interests and 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 challenges 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 ideology 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, the indelible impact on the victim and his family and all other attending circumstances are relevant facts which would enter into the area of consideration.

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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 deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread."

19. Vidyadharan v.State of Kerala (supra) relied upon by the learned counsel for the Respondent is not attracted to the facts of the present case as the act of outraging the modesty of a woman in that case was not as grave as in the present case.

20. In our criminal jurisprudence we have by and large followed reformatory policy and that was the reason for enactment of The Probation of Offenders Act, 1958 and Section 360 Cr.P.C. However there are categories of offences and the circumstances in which the offence is committed a deterrent punishment is awarded. There is mandate of the legislature to award minimum sentence of imprisonment in certain category of cases including sexual offences. Minimum higher punishment is provided in such offences against children less than 12 years of age. In this case the Respondent has not been found guilty of offence of attempt to rape a small child of about 7 years. There was preparation to commit rape which the Trial Court rightly found to be an offence of indecent assault punishable under Section 354 IPC. A deterrent policy was required to be adopted by the Trial Court in this case.

21. The Trial Court while exercising its discretion in awarding the sentence of rigorous imprisonment for a period of three months found that the Respondent was aged about 26 years; he had to maintain his family i.e. old aged parents and wife; there was no other person to look after the entire family; he was not a previous convict. At the same time the Trial Court observed that the Respondent took the prosecutrix to his room where he removed her entire clothes and applied oil on her. The Trial Court held that the Respondent shattered the dignity of the

prosecutrix which she would suffer throughout her life.

22. The sentence which could be awarded for the offence punishable under Section 354 IPC is imprisonment which may extend to two years or fine or both. No minimum punishment has been prescribed by the statute. If we go by the principle of proportionality as also the reformatory trend in our society the sentence of rigorous imprisonment for three months awarded by the Trial Court in our opinion was inadequate.

23. A perusal of the remand papers available on Trial Court record show that the Respondent was remanded to judicial custody on 02.02.2008. His bail orders were passed on 08.04.2008. The bail bond was accepted and the Respondent was released on 16.04.2008. Thus the Respondent was already sent to jail twice intermittently initially for a period of about two months and fifteen days and second time for a period of remaining fifteen days. In these circumstances interests of justice would not be subserved if the sentence of the Respondent is now increased, after a lapse of three years.

24. In the circumstances stated above we are not inclined to interfere with the discretion exercised in awarding the sentence by the Trial Court. For the above reasons the appeal has to fail and is accordingly dismissed.

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