

(2008) 04 GUJ CK 0030
In the Gujarat High Court
Case No : Criminal Appeal No. 1206 of 2003

Kanji Shivaji Thakor and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 23-04-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374(2)
Penal Code, 1860 (IPC) — Section 114, 307, 323, 324, 326

Citation : (2008) CriLJ 3083

Hon'ble Judges : M.R. Shah, J;J.R. Vora, J

Bench : Division Bench

Advocate : M.C. Barot,s 1 - 3, for the Appellant; Public Prosecutor for Opponent 1, for the Respondent

Judgement

M.R. Shah, J.—Instant appeal u/s 374(2) of the Code of Criminal Procedure is preferred by the appellants - original accused challenging the judgement and order of conviction dtd.25/9/2003 passed by the learned Additional Sessions Judge, Fast Track Court No. 2, Deesa at Palanpur, in Sessions Case No. 102 of 2000 convicting the appellants herein " original accused for the offences punishable under Sections 307, 323 and 114 of Indian Penal Code, sentencing the appellants to undergo Rigorous Imprisonment for a period of 10 years with fine of Rs. 3000=00 and in default, further Rigorous Imprisonment for a period of six months.

2. Mr. M.C. Barot, learned advocate appearing on behalf of the appellants " original accused has submitted that the appellants and the victim Dajaji Kacharaji have entered into a Deed of Compromise and have settled the dispute and therefore, the appellants do not challenge the impugned judgement and order of conviction on merits and accept the judgement and order of conviction passed by the trial court, however, has requested that in wake of the compromise arrived at between the parties, the sentence imposed by the learned trial court may be considered and reduced the sentence to the period already

undergone by the appellants.

3. At this stage it is required to be noted that in the facts and circumstances of the case, conviction u/s 307, 323 read with Section 114 of the Indian Penal Code is confirmed and/or sustained, we have made it clear to the learned advocate appearing on behalf of the appellants that we may not reduce the sentence to the period already undergone by the appellants which is hardly 2 to 3 months and therefore, the appellants may contest the case on merits, still, Mr. Barot, learned advocate for the appellants, in presence of the appellants " original accused present in the Court, has submitted that still the appellants - original accused do not challenge the impugned judgement and order of conviction on merits and has submitted that if this Court is not inclined to consider the prayer of the appellants to reduce the sentence to the period already undergone by the appellants, in that case, appropriate sentence be imposed and the appellants are ready and willing to abide by the order that may be passed by this Court.

4. Mr. Manav Mehta, learned advocate appearing on behalf of the original victim and Mr. M.C. Barot, learned advocate appearing on behalf of the original accused " appellants herein, have placed on record Compromise signed by the respective parties i.e. appellants herein as well as the original victim, identified by their respective advocates which is directed to be taken on record.

5. In view of the above, this Court is not required to deal with and/or consider the impugned judgement and order on merits and accordingly the impugned judgement and order passed by the learned Additional Sessions Judge, Fast Track Court No. 2, Deesa at Banaskantha dtd. 25/9/2003 passed in Sessions Case No. 102 of 2000 in so far as convicting the appellants " original accused for the offences punishable under Sections 307, 323 and 114 of Indian Penal Code is hereby confirmed.

6. Now, the next question which is required to be considered by this Court is question of sentence.

7. Mr. M.C. Barot, learned advocate appearing on behalf of the appellants " original accused has heavily relied upon the decision of the Hon"ble Supreme Court in the case of Dalbir Singh Vs. Director General, CRPF, New Delhi, as well as the decision in the case of Ram Ekbal Upadhyia and Anr. v. State of Bihar reported in, (2001) 10 SCC 233 . Mr. Barot, learned advocate appearing on behalf of the accused has submitted that in the case of Narendra Kumar alias Makiya (supra), the parties having entered into compromise, the Hon"ble Supreme Court for the offence u/s 307 of the Indian Penal Code has reduced the punishment and sentence to two years Rigorous Imprisonment. He has also further submitted that in the case of Ram Eqbal Upadhyia & Others (supra), considering the settlement arrived at between the parties, the Hon"ble Supreme Court has reduced the sentence to about four months already undergone. Mr. Barot, learned advocate appearing on behalf of the appellants has submitted that looking to the deposition of PW-1 Dr. Punamben Kanabhai Makwana Ex.14 as well

as deposition of PW-8 Dr. Vimal Gandhi Ex.30 and the injuries sustained by the victim, it is clear that the injuries are not serious in nature and the same will not fall within the definition of grievous hurt. He has also submitted that looking to the testimony of the Doctor, the injuries are simple in nature and were not likely to cause death and therefore, it is requested to pass appropriate order of reduction of sentence more particularly in view of the settlement arrived at between the parties, in the larger interest as they are relatives and residing in the same Maholla. It is also submitted that the fact that the incident had happened on 2/2/2000 and thereafter more than eight years have passed, be also considered while imposing the sentence.

8. Mr. Dipen Desai, learned APP appearing on behalf of the State has relied upon the following decisions of the Hon''ble Supreme Court:

- i. State of Uttar Pradesh Vs. Chandrika,
- ii. Shailesh Jasvantbhai and Another Vs. State of Gujarat and Others,
- iii. State of Karnataka Vs. Raju,
- iv. State of Madhya Pradesh Vs. Kedar Yadav,

9. Mr. Dipen Desai, learned APP has submitted that so far as the offence u/s 307 of the Indian Penal Code is concerned, injuries are not required to be seen but intention and attempt are required to be considered. He has submitted that u/s 307 of the Indian Penal Code, if a person is found to be accused of attempt of murder, he can be punished with imprisonment for a term which may extend to 10 years and shall also be liable to fine and if hurt is caused by any person by such act, offender shall be liable to imprisonment for life also. Therefore, it is submitted that even for mere attempt, offender can be punished with imprisonment upto 10 years. It is submitted that in the present case, over and above attempt to murder, hurt is also caused to the victim and therefore, even the accused persons could have been awarded sentence upto life. But still the learned trial court taking lenient view, imposed punishable of 10 years R.I. and therefore, leniency is already shown by the learned trial court.

10. Mr. Desai, learned APP has further submitted that as held by the Hon''ble Supreme Court in the cases of Shailesh Jasvantbhai and Anr. (supra) and Raju (supra), proportion between crime and punishment is a goal respected in principle. It is submitted that as observed by the Hon''ble Supreme Court in the said decisions in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. It is submitted that as observed by the Hon''ble Supreme Court undue sympathy to impose inadequate sentence would do more harm to the justice system to determine the public confidence in the efficacy of law and society could not long endure under such serious threats and it is 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.

11. Making the above submissions and relying upon the aforesaid decisions of the Hon"ble Supreme Court, Mr. Desai, learned APP has requested to impose appropriate sentence considering the ratio laid down by the Hon"ble Supreme Court in the aforesaid decisions and also considering the injuries sustained by the victim. He has further submitted that so far as the accused persons are concerned by now they have undergone only three months imprisonment and looking to the injuries caused to the victim and the manner in which the offence has been committed by the accused persons, the prayer of the appellants to reduce the sentence already undergone may not be accepted.

12. So far as the decisions of the Hon"ble Supreme Court in the cases of Narendra Kumar alias Makiya (supra) and Ram Ekbal Upadhya and Ors.(supra) relied upon by the learned advocate appearing on behalf of the appellants " original accused are concerned, Mr. Dipen Desai, learned APP has submitted that in the case of Narendra Kumar alias Makiya (supra), the Hon"ble Supreme Court, after considering the case on merits, altered the conviction u/s 307 of Indian Penal Code to that of u/s 324 of Indian Penal Code and imposed Rigorous Imprisonment for a period of two two years. Therefore, it is submitted that it was conviction u/s 324 and not u/s 307 of the Indian Penal Code. He has also further submitted that in the case of Ram (supra), the Hon"ble Supreme Court, after considering the case on merits, conviction u/s 307 of the IPC was altered to Section 326 of the Indian Penal Code. It is submitted that as the conviction u/s 307 r/w Section 114 of Indian Penal Code is not challenged and therefore, the conviction u/s 307 is to be sustained and therefore, considering the conviction u/ s 307 of Indian Penal Code, the question of sentence is required to be considered and therefore, it is submitted that the aforesaid decisions are not of any assistance to the appellants " original accused.

13. Heard the learned advocates appearing on behalf of the respective parties.

14. At the outset it is required to be noted that the appellants are convicted for the offences punishable Under Sections 307, 323 and 114 of Indian Penal Code and are sentenced to undergo Rigorous Imprisonment for 10 years with fine of Rs. 3000=00 and in default further Rigorous Imprisonment for a period of six months. The aforesaid judgement and order passed by the trial court is not challenged by the learned advocate appearing on behalf of the appellants and hence as stated above the judgement and order passed by the trial court convicting the appellants for the offences punishable under Sections 307, 323 and 114 of Indian Penal Code is hereby confirmed. Now, the only question which is required to be considered by this Court is with regard to imposition of adequate punishment and sentence.

15. Now considering the deposition of PW-1 Dr. Punamben Kanabhai Makwana Ex.14, deposition of PW-8 Dr. Vimal Gandhi Ex.30, the medical certificates and the evidence on record, it is clear that the injuries are by Dharia and stick and main injuries are on the head which can be considered to be on the vital part of the body. It is the submission on behalf of the appellants " original accused that

the injuries are simple injuries. As held by the Hon''ble Supreme Court in the case of Kedar Yadav (supra), it is sufficient to justify a conviction u/s 307 if there is present an intent coupled with some overt act in execution thereof. In para 16 the Hon''ble Supreme Court has further observed that for the conviction u/s 307, it is not essential that bodily injury capable of causing death should have been inflicted. As observed by the Hon''ble Supreme Court, Section 307 makes a distinction between the act of the accused and its result, if any and the Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the said Section. Therefore, as observed by the Hon''ble Supreme Court, an accused charged u/s 307 of Indian Penal Code cannot be acquitted merely because the injuries inflicted on the victim are simple in nature. In the said decision, the Hon''ble Supreme Court has also considered the decision of the Hon''ble Supreme Court in the case of Sarju Prasad Vs. State of Bihar, , wherein it was observed in para 6 that mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself sufficient to take the act out of the purview of Section 307. So far as the case on hand is concerned, as stated above, conviction u/s 307 is not challenged.

16. Now, in light of the above, this Court is required to consider what would be the adequate punishment and sentence in the facts and circumstances of the case. As held by the Hon''ble Supreme Court in the case of Shailesh Jasvantbhai and Anr. (supra), imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal and justice demands that courts should impose punishment befitting the crime so that courts reflect public abhorrence of the crime. As observed by the Hon''ble Supreme Court 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. The Hon''ble Supreme Court in para 7 to 13 in the case of Shailesh Jasvantbhai and Anr.(Supra has held as under:

7. 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 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 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.

8. 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 or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal, etc. Vs. State of Tamil Nadu*,

9. 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.

10. Proportion between crime and punishment is a goal respected in 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 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.

11. 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 Councle MCGDautha v. State of Callifornia* 402 US 183 : 28 LD 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 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.

12. In *Dhananjay Chatterjee alias Dhana Vs. State of W.B.*, this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminal 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. 1995 AIR SCW 510

13. Similar view has also been expressed in *Ravji alias Ram Chandra Vs. State of Rajasthan*, It has been held in the said case that it is the nature and 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 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 lose its relevance. In *State of Madhya Pradesh Vs. Ghanshyam Singh*, *Surjit Singh Vs. Nahara Ram and Another*, and *State of Madhya Pradesh Vs. Munna Choubey and Another*, the position was again highlighted.

17. Similar observations are made by the Hon"ble Supreme Court in the recent decision in the case of *Raju* (supra) and it is observed that undue sympathy to impose inadequate sentence would do more harm to the justice system to determine the public confidence in the efficacy of law and society could not long endure under such serious threats and it is 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. The Hon"ble Supreme Court has further held that justice demands that courts should impose punishment befitting the crime so that courts reflect public abhorrence of the crime. The Hon"ble Supreme Court has further observed that it is 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.

18. So far as the decisions of the Hon"ble Supreme Court in the cases of Narendra Kumar alias Makiya (supra) and Ram Ekbal Upadhya and Ors.(supra) relied upon by the learned advocate appearing on behalf of the appellants " original accused are concerned, in the case of Narendra Kumar alias Makiya (supra), the Hon"ble Supreme Court, after considering the case on merits, altered the conviction u/s 307 of Indian Penal Code to that of u/s 324 of Indian Penal Code and imposed Rigorous Imprisonment for a period of two two years. Thus, in the said case, it was conviction u/s 324 and not u/s 307 of the Indian Penal Code. Further, in the case of Ram (supra), the Hon"ble Supreme Court, after considering the case on merits, altered the conviction u/s 307 of the Indian Penal Code to Section 326 of the Indian Penal Code. Therefore, both the decisions relied upon by the learned advocate appearing on behalf of the appellants " original accused are not helpful to the appellants.

19. However, at the same time, while imposing the punishment and sentence, surrounding circumstances such as compromise/settlement entered into between the victim and the accused persons in the larger interest also plays an important role. However, courts are also required to see whether the settlement has been arrived at between the parties for some oblique motive or not and whether such settlement is a genuine settlement in the larger interest or not. If ultimately it is found that the settlement is for oblique motive and reason and/or the only consideration is money paid to victim and/or position of the accused in the society who can influence and/or pressurise the victim to enter into a settlement, in that case, irrespective of settlement, the Court may not reduce the sentence inspite of the settlement/compromise arrived at between the parties. Therefore, while considering the aspect of imposition of appropriate and suitable sentence, settlement entered into between the parties can also be considered. However, at the same time, as observed by the Hon"ble Supreme Court in the aforesaid decisions, punishment and the sentence cannot be disproportionate to the offence committed by the accused persons. In the case on hand, conviction under Sections 307, 323, 114 is sustained and confirmed. The injuries inflicted by the accused were by Dhariya on the head might not have resulted into a serious injuries. However, as stated above, settlement entered into between the victim and the original accused plays an important role so far as sentence is concerned. Under the circumstances and in the facts and circumstances of the case, we are of the view that if the punishment and sentence is reduced to six years rigorous imprisonment and fine is increased to Rs. 15,000=00 (Rupees Fifteen Thousand only) and fine is paid to the victim, it will meet the ends of justice.

20. For the reasons stated above, the appeal succeeds in part. The judgement and order dtd.25/9/2003 passed by the learned Additional Sessions Judge, Fast Track Court No. 2, Deesa at Palanpur, in Sessions Case No. 102 of 2000 convicting the appellants herein " original accused for the offences punishable

under Sections 307, 323, 114 of Indian Penal Code is hereby confirmed and the appellants - original accused are sentenced to undergo rigorous imprisonment for a period of six years with fine of Rs. 15,000=00 (Rupees Fifteen Thousand only), and in default rigorous imprisonment for a period of one years. The judgement and order passed by the trial court is modified to the aforesaid extent only so far as sentence is concerned. The amount of fine to be deposited by the appellants with the trial court within a period of two months from today and on such deposit, the said amount be paid to the victim named Dajaji Kacharaji on proper identification and verification by account payee cheque only.

21. At the request of Mr. M.C. Barot, learned advocate appearing on behalf of the appellants " original accused, the appellants are granted time upto six weeks from today to surrender.