
(2006) 01 DEL CK 0106

In the Delhi High Court

Case No : Criminal Appeal No. 154 of 2005 and Criminal M.A. No. 10975 of 2005

Sheikh Falsar

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 13-01-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 428
Penal Code, 1860 (IPC) — Section 302, 366, 376(2), 86

Citation : (2006) CriLJ 1105 : (2006) 2 RCR(Criminal) 668

Hon'ble Judges : Sanjiv Khanna, J; Manmohan Sarin, J

Bench : Division Bench

Advocate : V.K. Raina and G.P. Thareja, amices Curia, for the Appellant;
Ravinder Chadha, APP, for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan Sarin, J.—This appeal is preferred by Sheikh Falsar against the judgment dated 1st February, 2002 convicting the appellant for offences u/s 366 and Section 376(2)(f) of Indian Penal Code. Vide order of sentence dated 5th February, 2002, the appellant was sentenced to life imprisonment and a fine of Rs. 10,000/- for the offence u/s 376(2)(f), IPC. In default of payment of fine, appellant was to undergo further SI for one year. The appellant was also sentenced to rigorous imprisonment for nine years and a fine of Rs. 10,000/-. In default, simple imprisonment for one year for the offence u/s 366, IPC. Both the sentences are to run concurrently with the benefit of Section 428, Cr.P.C. also available to the appellant.

2. The appellant, as of now, has served a term of nearly five years and eight months. The appeal was admitted to hearing on 7th March, 2005. Mr. Ajay Sharma, Advocate, vide orders dated 7-3-2005 had been appointed as an amices Curiae. As Mr. Sharma was not present when the matter came up for hearing on 11th November, 2005 Mr. G.P. Thareja, retired Additional District and Sessions Judge was appointed as the amices Curiae to assist the Court along with Mr. V.K.

Raina, the nominated counsel from jail.

3. Learned Counsel for the appellant Mr. V.K. Raina and Mr. G.P. Thareja, amices Curiae and Mr. Ravinder Chadha on behalf of the State were heard on 20th December, 2005 and the judgment reserved. Learned counsel for the appellant as also the amices Curiae very candidly state that there is enough material and evidence on record to sustain the conviction. In fact, there are no good grounds available to challenge the conviction. Counsel have, Therefore, addressed us only on the quantum of sentence to which, we shall advert.

4. The facts giving rise to the present appeal may be briefly noted. On 11th April, 2000, the prosecutrix "B", a young girl of 7-8 years, had queued up along with other poor and destitutes, who line up at the Delhi's famous "Hanuman Mandir", to receive "Prasad" from the devotees visiting the temple. Her mother and aunt were also waiting in the queue. The prosecutrix was approached by the appellant with a promise to buy her bangles and a "Pajeb". The appellant took the young and unsuspecting girl to a Khatta (enclosure for garbage) where he removed her frock and got her naked and committed rape on her. The act was committed in a gruesome manner. The hymen was torn. There was a second degree perennial tear and profuse bleeding. The prosecutrix even became unconscious. Vagina had to be stitched.

5. One Ramesh Kumar Sharma, a public witness, heard the cries of the girl, when she was being raped. He peeped in and found the appellant wearing a banyan and tehmat. The appellant thereupon left the girl and took to his heels. Ramesh Kumar Sharma along with a Police Constable chased the appellant, who was apprehended after some distance and caught. Medical evidence and reports corroborate the testimony of prosecutrix and the public witness Ramesh Kumar Sharma of rape having been committed by the appellant. The mother of the prosecutrix was also examined, who stated that after finding her daughter missing, she was looking for her and found her at Kotwali with her clothes soaked with blood.

6. We have heard the counsel and perused the evidence on record. As noted confronted with the aforesaid evidence, learned counsel for the appellant and learned amices Curiae confined their submission to the quantum of sentence and in our view, rightly so.

7. Learned amices Curiae, after interviewing the appellant and ascertaining his family background, submitting the following profile of the appellant:

The appellant is a rickshaw puller by profession and had migrated to Delhi in search for better prospects from 24 Parganas, Kolkata, West Bengal nearly five years ago. The appellant has three brothers. Two of them are rickshaw pullers and the third is engaged in agriculture. The appellant is illiterate. He was married about 22 years ago and has two sons aged about 14 years and three years and two daughters aged about 11 years and 7 years.

8. The appellant claims clean antecedents and states that he has never been convicted before. The appellant in a statement u/s 313, Cr. P. C., while denying the charge, states that he was under the influence of liquor and did not know what had happened. Mr. V.K. Raina submitted that the appellant being intoxicated, could not be attributed with the knowledge and intention for his act. He placed reliance on the judgment *Basdev Vs. The State of Pepsu*, . We are not persuaded to accept this submission on behalf of the appellant. Reference may be made to Section 86 IPC. Section 86, IPC provides that a person who does an act in a state of intoxication, shall be liable to be dealt with as if he had the same knowledge as he would have if he was not intoxicated; unless the intoxicant is administered without his knowledge or against his will. Moreover, the cited judgment itself recognizes that drunkenness is ordinarily neither a defense nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it. It is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness has to be shown. In the instant case, no evidence of drunkenness has been led by the respondent. A perusal of the medical report of the appellant, who was examined on the same day at 4.45 p.m., i.e., within two hours of the crime, does not show or record any signs of drunkenness or alcohol having been consumed. This plea is, Therefore, not available to the appellant.

9. Coming now to the question of sentence, Mr. Thareja submitted that keeping in mind that the appellant did not have any past criminal record and was a first time offender, the punishment of life imprisonment, which is the maximum punishment, was rather harsh. He submitted that the appellant was away from home having left his family behind and was facing the rigours of a new city. He appears to have been carried away and lost control over himself. Mr. Thareja submitted that no doubt, the crime of the person on an innocent girl of 8 years when the appellant himself has two daughters, one of whom is older to the victim, was a ghastly crime and deserves to be adequately dealt with. Learned counsel submitted that the appellant's family had been rendered destitute with his incarceration and they have no one to fend for them. In these circumstances, the appellant's sentence ought to be reduced from life imprisonment to a lesser term as prescribed under the statute. He submits that, if the sentence of life imprisonment was retained, which is normally the sentence for offences u/s 302, the appellant would stand condemned for life without any possibility of reformation.

10. We may take note of recent judicial pronouncements of the Supreme Court on the subject which have been cited by the counsel. Learned amicus Curiae has placed reliance on *State of M.P. Vs. Bala @ Balaram*, . In the cited case, Supreme Court set aside the decision of the High Court in appeal reducing the sentence to period already undergone, i.e., nearly 9 1/2 months u/s 376(2)(g) and remanded the case back. The Supreme Court found that the sentence awarded by the High

Court was not only grossly inadequate but contrary to the provisions of law. It held that the High Court had not assigned any satisfactory reason much less adequate and special reasons for reducing the sentence to a term, which is far below the prescribed term. P. K. Balasubramanyan, J. in the concurring judgment observed as under (Paras 12, 13, 15, & 17 of Cri LJ) :

The punishments prescribed by the Penal Code reflect the legislative recognition of the social needs, the gravity of the offence concerned, 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.

The rationale for advocating the award of a punishment commensurate with the gravity of the offence and its impact on society is to ensure that a civilised society does not revert to the days of "an eye for an eye and a tooth for a tooth". Not awarding a just punishment might provoke the victim or its relatives to retaliate in kind and that is what exactly is sought to be prevented by the criminal justice system we have adopted. Even in the time of Kautilya, the need for awarding just punishment was recognised. According to Kautilya, "Whoever imposes severe punishment becomes repulsive to people, while he who awards mild punishment becomes contemptible. The ruler just with the rod is honoured. When deserved punishment is given, it endows the subjects with spiritual good, material well-being and pleasures of the senses." This philosophy is woven into our statute and our jurisprudence and it is the duty of those who administer the law to bear this in mind.

The punishment must fit the crime and it is the duty of the Court to impose a proper punishment depending on the degree of criminality and desirability for imposing such punishment. However, the awarding of inadequate punishments by Courts is becoming disturbingly frequent.

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It is true that reformation as a theory of punishment is in fashion but under the guise of applying such theory, the Courts cannot forget their duty to society and to the victim. The Court has to consider the plight of the victim in a case involving rape and the social stigma that may follow the victim to the grave and which in most cases, practically ruins all prospects of a normal life for the victim. A Court cannot afford to forget these aspects while imposing a punishment on the aggressor. The Court has to do justice to society and to the victim on the one hand and to the offender on the other. The proper balance must be taken to have been struck by the legislature. Hence, the legislative wisdom reflected by the statute has to be respected by the Court and the permitted departure there from made only for compelling and convincing reasons.

11. Reference is also invited to the decision of the Supreme Court in *The State of Karnataka Vs. Krishnappa*, where the relevant facts, the age of the victim, the circumstances of the illiterate accused and the manner of crime are almost

similar to the present case. The prosecutrix, a girl of 8 years was raped by the accused, who attempted to first molest the mother, who escaped and then caught hold of the prosecutrix and had forcible intercourse with her. The Trial Court sentenced the accused to 10 years rigorous imprisonment. The High Court found it to be a case for showing leniency. The accused being 49 years of age having an old mother, wife and children to look after, it was stated by the accused that all the members of his family were depending on him for their livelihood and if he was sent to jail, his family would be ruined. The Division Bench taking note of these circumstances, observed (Para 7 of Cri LJ) :

Here is a case of an unsophisticated and illiterate citizen belonging to a weaker section of the society, having committed various offences while in a state of intoxication. It is common knowledge that when a man goes in a state of intoxication whether voluntarily or involuntarily, his reason would be unseated. He would indulge in acts knowing not the consequences of his acts which he forgets soon after he returns to a normal state.

Observing thus, the High Court reduced the sentence to 41/2 years. The Supreme Court considered the above factors and noticed that the legislative mandate was to impose a sentence for the offence of rape on a girl under the age of 12 years for a term which shall not be less than 10 years. It may extend for life and also a fine. The proviso enables the Court to impose a lesser sentence for adequate and special reasons. The Court noted that it was 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. The 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. The Court deprecated the approach and reasoning of the High Court and held as under *The State of Karnataka Vs. Krishnappa*,

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 a 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 circumstances 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 crime 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.

12. We find that the case in hand as observed earlier, has a number of similarities with the case of *The State of Karnataka Vs. Krishnappa*, In this case also, drunkenness, poverty, illiteracy and belonging to weaker section of the society are sought to be raised as grounds for clemency. Following the legal principles as enunciated in the judgments cited above, we are of the view that keeping the age of the appellant, family circumstances and considering especially that he has no past criminal antecedents and this is stated to be the first and solitary offence, the sentence of 10 years" RI as prescribed under the statute would meet the ends of justice.

We record our appreciation for the assistance rendered by Mr. G. P. Thareja, learned amicus Curiae.

13. We accordingly reduce the sentence of life imprisonment u/s 376(2)(f) to 10 years" RI with a fine of Rs. 10,000/-. In default of payment of fine, appellant to undergo further SI for one year. The sentence of RI of 9 years and fine of Rs. 10,000/-and in default, SI for one year for the offence u/s 366, IPC is maintained. The sentences to run concurrently with benefit of Section 428, Cr. P. C.

14. The conviction of the appellant is maintained with the sentence as modified above.

15. The appeal stands disposed of in the above terms.