

(2016) 03 GUJ CK 0026
In the Gujarat High Court

Case No : Criminal Appeal (for Enhancement) No. 1002 of 2014

State of Gujarat

APPELLANT

Vs

Himabhai Dhuliyabhai Ninama

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 307, Section 377
Penal Code, 1860 (IPC) — Section 376, Section 376(2), Section 395

Citation : (2016) 03 GUJ CK 0026

Hon'ble Judges : M.R. Shah and Mohinder Pal, JJ.

Bench : Division Bench

Advocate : L.B. Dabhi, APP, for the Appellant; Yogendra Thakore, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

M.R. Shah, J.—1. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Principal Sessions Judge, Dahod (hereinafter referred to as "the learned trial Court") in Sessions Case No. 15/2013 in so far as imposing sentence of two years Rigorous Imprisonment only while convicting the original accused for the offence punishable under Section 395 of the Indian Penal Code, State has preferred the Appeal under Section 377 of the Code of Criminal Procedure for enhancement of sentence.

2. At the outset it is required to be noted that as such the learned trial Court has held the original accused guilty for the offence punishable under Section 395 of the Indian Penal Code. So far as the conviction of the original accused for the offence punishable under Section 395 of the Indian Penal Code is concerned the same has attained finality so far the original accused is concerned as the original accused has not challenged the judgment and order of conviction. It is also required to be noted at this stage that the original accused had already undergone two years imprisonment in view of the judgment and order passed by the learned trial Court for the offence punishable under Section 395 of the Indian

Penal Code. Be that as it may. In the present Appeal the question, which is posed for consideration of this Court is, whether in the facts and circumstances of the case and while convicting the original accused for the offence punishable under Section 395 of the Indian Penal Code sentence imposed by the learned trial Court can be said to be just and adequate punishment commensurate with the gravity of the offence or not?

3. Shri L.B. Dabhi, learned APP appearing on behalf of the State has vehemently submitted that in the facts and circumstances of the case and the manner in which the original accused alongwith other accused persons, who are absconding, have committed the loot of the goods/ornaments worth Rs. 1,75,000/-, the learned trial Court has materially erred in imposing the sentence of two years Rigorous Imprisonment only. It is further submitted by Shri Dabhi, learned APP appearing on behalf of the State that while imposing the sentence of two years Rigorous Imprisonment for the offence punishable under Section 395 of the Indian Penal Code the learned trial Court has not exercised the discretion judiciously and as such has not applied the mind properly while imposing the sentence.

3.1 It is further submitted by Shri Dabhi, learned APP appearing on behalf of the State that the learned Judge has not properly appreciated the fact that in the said area in which the offence was committed by the original accused such incidence of loot/dacoity are rampant and the persons like original accused and others come from the adjoining city and commit loot/dacoity/robbery and go back to another State. It is submitted that as per the case of the prosecution and even the original complainant, gang of approximately 25 persons came with deadly weapon and committed the loot/dacoity/robbery in the entire area. It is submitted that therefore atmosphere of terror was created by the original accused and other persons (absconding persons). It is submitted that therefore the sentence imposed by the learned trial Court cannot be said to be just and adequate punishment commensurate with the gravity of the offence.

Making the above submissions and relying upon the following decisions of the Hon'ble Supreme Court as well as this Court it is requested to impose maximum punishment provided under Section 395 of the Indian Penal Code i.e. Life Imprisonment.

- (i) Sumer Singh vs. Surajbhan Singh and others reported in , (2014) 7 SCC 323;
- (ii) Narinder Singh and others vs. State of Punjab and another reported in , (2014) 6 SCC 466;
- (iii) State of Karnataka vs. Krishnappa reported in , (2000) 4 SCC 75; and
- (iv) Shimbhu and another vs. State of Haryana reported in , (2014) 13 SCC 318.

4. Shri Yogendra Thakore, learned advocate appearing on behalf of the original accused has opposed the present Appeal It is submitted that in the facts and circumstances of the case and except Rs. 4000/- and one mobile belonging to

the original complainant nothing else has been recovered from the original accused, and therefore, the sentence imposed by the learned Judge cannot be said to be disproportionate to the offence committed by the original accused. It is further submitted by Shri Thakore, learned advocate appearing on behalf of the original accused that the sentence provided under Section 395 of the Indian Penal Code would be Life Imprisonment or sentence of Rigorous Imprisonment up to ten years with fine. It is submitted that therefore the learned Judge had wide discretion to impose the sentence up to ten years with fine and while exercising such discretion when the learned Judge has imposed the sentence of two years Rigorous Imprisonment with fine of Rs. 1,000/-, the same is not required to be interfered with by this Court in exercise of appellate jurisdiction.

Making the above submissions, it is requested to dismiss the present Appeal.

5. Heard the learned advocates appearing on behalf of the respective parties at length. Perused the impugned judgment and order of conviction passed by the learned trial Court and even the reasoning given by the learned Judge while awarding sentence of two years Rigorous Imprisonment with fine of Rs. 1000/- and in default to undergo further one year Rigorous Imprisonment while convicting the original accused for the offence punishable under Section 395 of the Indian Penal Code.

5.1 From the reasoning assigned by the learned Judge while awarding the sentence of two years Rigorous Imprisonment, it appears that as such no cogent and adequate reasons have been assigned by the learned Judge while imposing the sentence of two years Rigorous Imprisonment only for the offence punishable under Section 395 of the Indian Penal Code. There is no whisper in the judgment that according to the learned Judge and in the facts and circumstances of the case imposing the sentence of two years Rigorous Imprisonment can be said to be adequate and just commensurate with the gravity of the offence. There does not seem to be any proper application of mind by the learned Judge while awarding the sentence of convicting the original accused under Section 395 of the Indian Penal Code. It cannot be disputed and as per the settled proposition of law the sentence must be adequate and just commensurate with the gravity of the offence.

5.2 In the case of Sumer Singh (Supra) the Hon''ble Supreme Court had an occasion to consider the principle of sentencing proportionality and adequacy of sentence. In the aforesaid decision while emphasizing the need for appropriate punishment in paragraph-36 the Hon''ble Supreme Court has observed and held as under:-

"36. Having discussed about the discretion, presently we shall advert to the duty of the court in the exercise of power while imposing sentence for an offence. It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the

guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the Court's accountability to remind itself about its role and the reverence for rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society. Therefore, striking the balance we are disposed to think that the cause of justice would be best subserved if the respondent is sentenced to undergo rigorous imprisonment of two years apart from the fine that has been imposed by the learned trial Judge.

5.3 Again in the case of Narinder Singh and others (Supra), the Hon''ble Supreme Court had an occasion to consider the sentencing policy, the purpose/ jurisprudential justification of awarding sentence (deterrence, retribution or rehabilitation) vis-a-vis nature of crime. In para 14, 16 and 17 the Hon''ble Supreme Court has observed as under:-

14. The Law prohibits certain acts and/or conduct and treats them as offences. Any person committing those acts is subject to penal consequences which may be of various kind. Mostly, punishment provided for committing offences is either imprisonment or monetary fine or both. Imprisonment can be rigorous or simple in nature. Why those persons who commit offences are subjected to such penal consequences? There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.

16. What follows from the discussion behind the purpose of sentencing is that if a particular crime is to be treated as crime against the society and/or heinous crime, then the deterrence theory as a rationale for punishing the offender becomes more relevant, to be applied in such cases. Therefore, in respect of such offences which are treated against the society, it becomes the duty of the State to punish the offender. Thus, even when there is a settlement between the

offender and the victim, their will would not prevail as in such cases the matter is in public domain. Society demands that the individual offender should be punished in order to deter other effectively as it amounts to greatest good of the greatest number of persons in a society. It is in this context that we have to understand the scheme/philosophy behind Section 307 of the Code.

17. We would like to expand this principle in some more detail. We find, in practice and in reality, after recording the conviction and while awarding the sentence/punishment the Court is generally governed by any or all or combination of the aforesaid factors. Sometimes, it is the deterrence theory which prevails in the minds of the Court, particularly in those cases where the crimes committed are heinous in nature or depicts depravity, or lack morality. At times it is to satisfy the element of "emotion" in law and retribution/vengeance becomes the guiding factor. In any case, it cannot be denied that the purpose of punishment by law is deterrence, constrained by considerations of justice. What, then, is the role of mercy, forgiveness and compassion in law? These are by no means comfortable questions and even the answers may not be comforting. There may be certain cases which are too obvious namely cases involving heinous crime with element of criminality against the society and not parties inter se. In such cases, the deterrence as purpose of punishment becomes paramount and even if the victim or his relatives have shown the virtue and gentility, agreeing to forgive the culprit, compassion of that private party would not move the court in accepting the same as larger and more important public policy of showing the iron hand of law to the wrongdoers, to reduce the commission of such offences, is more important. Cases of murder, rape or other sexual offences etc. would clearly fall in this category. After all, justice requires long term vision. On the other hand, there may be, offences falling in the category where "correctional" objective of criminal law would have to be given more weightage in contrast with "deterrence" philosophy. Punishment, whatever else may be, must be fair and conducive to good rather than further evil. If in a particular case the Court is of the opinion that the settlement between the parties would lead to more good; better relations between them; would prevent further occurrence of such encounters between the parties, it may hold settlement to be on a better pedestal. It is a delicate balance between the two inflicting interests which is to be achieved by the Court after examining all these parameters and then deciding as to which course of action it should take in a particular case.

5.4 While considering the minimum sentence provided under Section 376(2) of the IPC the Hon"ble Supreme Court in the case of Krishnappa (Supra) in para 12 to 16 has observed and held as under:-

"12. A perusal of the above provision shows that the legislative mandate is 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, it may extend to life and also to fine. The proviso to S. 376(2), I.P.C., 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 R.I. though in exceptional cases "for special and adequate reasons" sentence of less than 10 years R.I. 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.

13. The approach of the High Court in this case, to say the least, was most casual and inappropriate. There are no good reasons given by the High Court to reduce the sentence, let alone "special or adequate reasons." The High Court exhibited lack of sensitivity towards the victim of rape and the society by reducing the substantive sentence in the established facts and circumstances of the case. The Courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commission of like offences by others.

14. In *State of A.P. v. Bodem Sundara Rao*, , (1995) 6 SCC 230 : (1995 AIR SCW 4435 : AIR 1996 SC 530), while dealing with a case of reduction of sentence from 10 years R.I. to 4 years R.I. by the High Court in the case of rape of a girl aged between 13 and 14 years, it was observed (para 9 of AIR):

"9. In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the Court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane." (Emphasis supplied) The sentence as accordingly enhanced to 7 years R.I. in the said case.

15. Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends herself esteem and dignity it degrades and

humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. Dealing with the offence of rape and its traumatic effect on a rape victim, this Court in *State of Punjab v. Gurmit Singh*, , (1996) 2 SCC 384 : (1996 AIR SCW 998 : AIR 1996 SC 1393 : 1996 Cri LJ 1728) observed (para 20 of AIR):

"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a greater responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity."

16. A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

5.5 While considering the discretion vested in the court while awarding the sentence less than the minimum provided under Section 376 of the IPC and the direction on the judges to levy the appropriate sentence the Hon"ble Supreme Court in the case of *Shimbhu and another* (Supra), has observed in para 11, 19 and 22 as under:-

"11. The crucial stage in every criminal proceeding is the stage of sentencing. It is the most complex and difficult stage in the judicial process. The Indian legal system confers ample discretion on the Judges to levy the appropriate sentence. However, this discretion is not unfettered in nature rather various factors like the nature, gravity, the manner and the circumstances of the commission of the offence, the personality of the accused, character, aggravating as well as mitigating circumstances, antecedents etc., cumulatively constitute as the yardsticks for the Judges to decide on the sentence to be imposed. Indisputably, the sentencing Courts shall consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the crime committed.

19. 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 or the long pendency of the criminal trial or offer of the rapist to marry the victim or the

victim is married and settled in life cannot be construed as special factors for reducing the sentence prescribed by the statute. The power under the proviso should not be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation.

22. This is yet another opportunity to inform the subordinate Courts and the High Courts that despite stringent provisions for rape under Section 376, IPC, many Courts in the past have taken a softer view while awarding sentence for such a heinous crime. This Court has in the past noticed that few subordinate and High Courts have reduced the sentence of the accused to the period already undergone to suffice as the punishment, by taking aid of the proviso to Section 376(2), IPC. The above trend exhibits stark insensitivity to the need for proportionate punishments to be imposed in such cases. It is further observed by the Hon''ble Supreme Court in the said decision that therefore, regard being had to gravity of offence, reduction of sentence, indicating any imaginary special reason, would be an anathema to very concept of rule of law. It is observed that, perpetrators of the crime must, that when they indulge in such offence, they really create a concavity in dignity and bodily integrity of an individual, which is recognised, assured and affirmed by very essence of Article 21 of the Constitution."

5.6 Now applying the law laid down by the Hon''ble Supreme Court in the aforesaid decisions to the facts and circumstances of the case on hand and the reasons given by the learned Judge while imposing the sentence of two years Rigorous Imprisonment for the offence punishable under Section 395 of the Indian Penal Code is concerned, the learned Judge has not applied the mind while awarding the suitable punishment for the offence punishable under Section 395 of the Indian Penal Code. As such, no adequate reasons are given while imposing the sentence of two year Rigorous Imprisonment that too for the offence punishable under Section 395 of the Indian Penal Code. It is true that the learned trial Court had wide discretion either to impose the sentence of Life Imprisonment or Rigorous Imprisonment up to ten years with fine. However, as observed by the Hon''ble Supreme Court in the aforesaid decisions, discretion must be exercised judiciously and it must be reflected from the order that the learned Judge has applied the mind while imposing the punishment/sentence and it must reflect that there is proper application of mind while imposing suitable, just and adequate punishment. It is required to be noted that the offence punishable under Section 395 of the Indian Penal Code as such is a grave offence. In the area in which the offence is committed such type of cases of loot/robbery/dacoity are increasing. Original accused belongs to the neighbouring State and after committing the robbery/loot he flees to the neighbouring State. Even the manner in which the original accused alongwith others (absconding accused) have committed the offence is also required to be considered. According to the original complainant gang of approximately 25 persons attacked the village of the area with deadly weapon and the original accused was one of them who committed the robbery at his residence and looted the ornaments/

goods and other articles worth Rs. 1,75,000/-. It is required to be noted that as such 11 persons were named in the chargesheet. However, 10 persons are found to be absconding and only one accused i.e. original accused herein was arrested, and therefore, he came to be tried for the aforesaid offence, and therefore, in the facts and circumstances of the case, the learned trial Court has committed a grave error in imposing the sentence of two years Rigorous Imprisonment only with fine for the offence punishable under Section 395 of the Indian Penal Code. Under the circumstances, imposing two years Rigorous Imprisonment with fine of Rs. 1000/- and in default to undergo one year Rigorous Imprisonment for the offence punishable under Section 395 of the Indian Penal Code cannot be said to be just and adequate, and therefore, interference of this Court is called for and the impugned judgment and order passed by the learned trial Court in so far as imposing the sentence is concerned is required to be interfered with by this Court in exercise of appellate jurisdiction.

6. In view of the above and for the reasons stated hereinabove, the Appeal succeeds in part. The impugned judgment and order passed by the learned Principal Sessions Judge, Dahod in Sessions Case No. 15/2013 is hereby modified to the extent and while convicting the original accused for the offence punishable under Section 395 of the Indian Penal Code the original accused is directed to undergo 10 years" Rigorous Imprisonment with a fine of Rs. 1000/- and in default to undergo further 1 year Rigorous Imprisonment.

6.1 It is reported that the original accused had already undergone two years Rigorous Imprisonment at the time when the learned Judge passed the impugned judgment and order, and therefore, he must be out of jail. Therefore, the original accused shall be taken into custody forthwith for undergoing remaining sentence as per the present judgment and order.

Registry is directed to return the Record and Proceedings to the learned trial Court forthwith.