

(2016) 01 GUJ CK 0200
In the Gujarat High Court

Case No : Criminal Appeal Nos. 1214, 1213 and 1145 of 2011

State of Gujarat

APPELLANT

Vs

Kishorebhai Kanabhai Rathod

RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135
Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 236, Section 307, Section 323, Section 324, Section 326, Section

Citation : (2016) 01 GUJ CK 0200

Hon'ble Judges : M.R. Shah and Z.K. Saiyed, JJ.

Bench : Division Bench

Advocate : K.P. Raval, APP, for the Appellant; Mrudul M. Barot, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

M.R. Shah, J.—1. All these appeals arise out of the impugned judgment and order passed by the learned Additional Sessions Judge, Banaskantha (hereinafter referred to as "trial Court") in Sessions Case No. 215 of 2007, one by the original accused No. 1 challenging his conviction for the offences punishable under sections 307, 326, 324, 323 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and section 135 of the Bombay Police Act and another appeal preferred by the State challenging the impugned judgment and order passed by the learned trial Court acquitting the original accused Nos. 2 to 4 and one another appeal preferred by the State for enhancement of the sentence imposed by the learned trial Court, imposed while convicting the original accused No. 1 for the offences punishable under sections 307, 326, 324, 323 of the IPC, all these appeals are decided and disposed of by this common judgment and order.

2. At the outset it is required to be noted that all the original accused Nos. 1 to 4 were as such charged for the offences punishable under sections 307, 326, 324,

323, 504 and 34 of the IPC and section 135 of the Bombay Police Act and on appreciation of evidence, the learned trial Court has held the original accused No. 1 guilty for the offences punishable under sections 307, 326, 324, 323 of the IPC and section 135 of the Bombay Police Act and has imposed the sentence of 5 years" RI and fine of Rs. 5000/- and in default to undergo further 6 months" R1 for the offence punishable under section 307 of the IPC and sentenced original accused No. 1 to undergo 5 years" RI with fine of Rs. 1000/- and in default to undergo further 10 days" R1 for the offence punishable under section 326 of the IPC. No separate sentence has been imposed by the learned trial Court while convicting the original accused No. 1 for the offences punishable under sections 324 and 323 of the IPC. By impugned judgement and order the learned trial Court has acquitted the original accused Nos. 2 to 4.

2.01. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned trial Court convicting the original accused No. 1 for the offences punishable under sections 307, 326, 324, 323 of the IPC, the original accused No. 1 has preferred the Criminal Appeal No. 1145 of 2011.

2.02. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned trial Court, the State has preferred Criminal Appeal No. 1214 of 2011 to enhance the sentence imposed by the learned trial Court, imposed while convicting the original accused No. 1 for the offences punishable under sections 307, 326, 324, 323 of the IPC.

2.03. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned trial Court insofar as acquitting the original accused Nos. 2 to 4, the State has also preferred the Criminal Appeal No. 1213/2011.

3. The case of the prosecution in nutshell is as under:

"3.01. That the complainant Mukeshbhai Babubhai Rathod lodged a complaint against the present respondents and others before the Police Inspector, Bhavnagar B-Division Police Station alleging inter-alia that on 18/2/2007 at about 5.30 hours, while the complainant was present at his house, the accused persons were gambling near the house of the complainant, and accordingly complainant scolded not to gamble near his house. That the son of the complainant namely Hitesh was also gambling with the accused persons and therefore, he has told his son not to take part in gambling and therefore, the accused persons got excited and started to give filthy abuses. At the relevant point of time, the brother of complainant Kismat intervened and saved the complainant from further beating. Thereafter, after half an hour accused Kishore Kana, son of Himat Jiva and brother of Raju Tebhani as well as one person staying in the Para area, came near the house of the complainant and assaulted upon the complainant with deadly weapons like knife and dhoka. At the relevant point of time, accused Kishore Kana and accused who was staying in para area was armed with knife and son of accused Himat Jiva and brother of Raju Tebhani was armed with Dhoka, who called the complainant out of his house and

assaulted upon him. The accused Kishore Kana inflicted one knife blow on back of complainant and other on thigh, the brother of Raju Tebhani and son of Himat Jiva had beaten the complainant with help of Dhoka. One person who was staying in Para area had inflicted knife blows on face, forehead and back of brother of complainant, Kismat and brother of Raju Tebhani and son of Himat Jiva had beaten the brother of complainant with Dholka. At the relevant point of time, Rekhaben who is Bhabhi of complainant and one Pravinbhai intervened and save the complainant and his brother from further beating and taken them in hospital. Therefore, complainant was given against respondents accused before the Bhavnagar B-Division Police Station for the alleged offences under sections 307, 326, 323, 324, 504, 34 of Indian Penal Code and section 135 of Bombay Police Act and investigation was carried out.

3.01. That the aforesaid FIR was investigated by the investigating officers - Lakhubha Bhurubha Chudasama - PW No. 14 and thereafter by Bachubhai Jivabhai Ninama - PW No. 15. The investigating officer recorded statements of the concerned witnesses; he also prepared panchnama of the place of offence; he also recovered medical certificates with respect to the medical treatment of injured Mukeshbhai and Kishorbhai. The investigating officer also discovered knife used by the original accused No. 1 at the instance of the original accused No. 1 having blood stains. He also sent the knife to the FSL.

3.02. That on conclusion of the investigation, and having found prima facie case, the investigating officer filed chargesheet against the accused persons for the offences punishable under sections 307, 326, 324, 323, 504 and 34 of IPC and for the offence u/s. 135 of BP Act.

3.03. That as the case was exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, First Class, Bhavnagar committed the case to the Sessions Court, Bhavnagar, which was transferred to the Court of learned Additional Sessions Judge, FTC No. 2, Bhavnagar which was numbered as Sessions Case No. 215 of 2007.

3.04. That the learned trial court framed Charge against the accused for the aforesaid offences, however, the accused pleaded not guilty and therefore, they came to be tried by the learned trial court.

3.05. To prove the case against the accused, the prosecution examined the following witnesses:

3.06. Through the aforesaid witnesses, the prosecution brought on record the following documentary evidences;

3.07. That after closing pursish submitted by the prosecution, Further Statement of all the accused came to be recorded under section 313 of the Code of Criminal Procedure and all of them denied having committed any offence. However, they did not lead any evidence on support of their defence.

3.08. That at the conclusion of the trial, by the impugned judgement and award

the learned trial court has held the original accused No. 1 guilty for the offence under section 307, 326, 324, 323 of IPC and under section 135 of BP Act and has sentenced the original accused No. 1 to undergo 5 years RI with fine of Rs. 5000 and in default, to undergo further 6 months RI for the offence u/s. 307 of IPC and sentenced the original accused No. 1 to undergo 5 years RI with fine of Rs. 1000 and in default, to undergo further 10 days RI for the offence u/s. 236 of IPC. That no separate sentence has been imposed while convicting the original accused No. 1 for the offence u/ss. 323 and 324 of IPC.

3.09. That by the impugned judgement and order, the learned trial court has acquitted the original accused Nos. 2 to 4 for the offences for which they were tried.

3.10. Feeling aggrieved and dissatisfied with the impugned judgement and order of conviction, the original accused No. 1 has preferred Criminal Appeal No. 1145 of 2011 and State has preferred criminal Appeal No. 1214 of 2011 for enhancement of the sentence imposed by the learned trial court imposed while convicting the original accused No. 1 for the offences u/ss. 307, 326, 324 and 323 of IPC. Feeling aggrieved and dissatisfied with the impugned judgement and order of acquittal acquitting the original accused Nos. 2 to 4, the State has preferred Criminal Appeal No. 1213 of 2011."

4. Criminal Appeal No. 1145 of 2011:

Submissions of the appellant - Ori. Accused No. 1:

4.01. Ms. Rekha Kapadia, learned advocate appearing on behalf of the original accused No. 1 has vehemently submitted that the learned trial court has materially erred in convicting the original accused No. 1. He has submitted that as such there are material contradictions in the complaint given by the original complainant - PW No. 1 and in his deposition and there are material contradictions in the deposition of PW Nos. 1 and 3 - both injured witnesses.

4.02. Ms. Rekha Kapadia, learned advocate appearing on behalf of the original accused No. 1 has vehemently submitted that the learned trial court has materially erred in convicting the original accused No. 1 relying upon the evidence of the witnesses who are interested witnesses and no independent witnesses have been examined.

4.03. Ms. Rekha Kapadia, learned advocate appearing on behalf of the original accused No. 1 has vehemently submitted that in the present case Panchas of the panchnama of discovery of the knife at the instance of the original accused No. 1, have not supported the discovery panchnama. It is submitted that, therefore, no reliance can be placed upon the discovery panchnama, which has not been proved.

4.04. Ms. Rekha Kapadia, learned advocate appearing on behalf of the original accused No. 1 has vehemently submitted that in the present case even as admitted by the investigating officer Bachubhai Jivabhai Ninama who has been

examined at Ex. 82, no identification parade was carried out. It is submitted that despite the above, the learned trial court has convicted the original accused No. 1 in absence of any identification parade of the accused No. 1.

4.05. Ms. Rekha Kapadia, learned advocate appearing on behalf of the original accused No. 1 has vehemently submitted that in the present case, the learned trial court has materially erred in convicting the original accused No. 1 relying upon the deposition of the injured witnesses PW Nos. 1 and 3. Making above submissions, Ms. Rekha Kapadia, learned advocate appearing on behalf of the original accused No. 1 has requested to acquit the original accused No. 1 for the offences for which he has been convicted.

Submissions on behalf of the State:

4.06. Appeal preferred by the original accused No. 1 challenging his conviction is vehemently opposed by Mr. K.P. Raval, learned APP appearing on behalf of the State. He has vehemently submitted that in the present case, the name of the original accused No. 1 has been disclosed in the FIR and specific role is attributed in the FIR.

4.07. Mr. K.P. Raval, learned APP appearing on behalf of the State has further submitted that even before the history given by the injured eye witness, the witness - original complainant has categorically disclosed the name of the original accused No. 1 and has stated that the original accused No. 1 has inflicted injury with knife. It is submitted that the same is substantiated by the medical certificate and medical report issued by the Doctor. It is submitted that the aforesaid have been proved by examining the Doctor who can be said to be an independent eye witness.

4.08. Mr. K.P. Raval, learned APP appearing on behalf of the State has further submitted that in the present case, even there is discovery of knife at the instance of the original accused No. 1. It is submitted that though the panch witnesses of the discovery panchnama have turned hostile, the discovery panchnama has been proved by the prosecution by examining the investigating officer. It is submitted that in the cross examination of the investigating officer, no question was asked by the defence about the discovery panchnama at the instance of the original accused No. 1. It is submitted that therefore, as such the discovery panchnama has been proved by the prosecution by examining the investigating officer. He has further submitted that the injury sustained by the injured witnesses can be by knife, which has been discovered at the instance of the original accused No. 1 and the discovery of knife at the instance of the original accused No. 1 has been proved and established by examining Doctor. It is submitted that the Doctor in his deposition has categorically stated and deposed in his deposition that injuries sustained by the complainant are possible by knife. It is submitted that therefore, the learned trial court has not committed any error in convicting the original accused No. 1.

5. Criminal Appeal No. 1214 of 2011:

Submissions on behalf of the appellant State:

5.01. Now, so far as the Criminal Appeal No. 1214 of 2011 has been preferred by the State for enhancement of the sentence imposed by the learned trial court imposed while convicting the original accused No. 1 for the offences punishable under sections 307, 326, 324, 323 of IPC, is concerned, Mr. K.P. Raval, learned APP appearing on behalf of the State has vehemently submitted that the sentence imposed by the learned trial court can not be said to be punishment commensurate with the gravity of the offence. It is vehemently submitted that the manner in which the original accused No. 1 inflicted injuries by knife on the injured eye witnesses and one on the back portion of the body and another near eye i.e. on the face, the learned trial court has materially erred in imposing punishment of 5 years RI for the offence u/ss. 307 and 326 of IPC.

5.02. Relying upon decisions of the Hon'ble Supreme Court in the case of State of Madhya Pradesh Versus Imrat & another, reported in , AIR 2008 S.C. 2967 and in the case of State of Madhya Pradesh Versus Saleem alias Chamaru and another, reported in , AIR 2005 SC 3996, Mr. K.P. Raval, learned APP appearing on behalf of the State has requested to allow the appeal preferred by the State and to impose maximum punishment provided for the offence under section 307 of IPC.

By making above submissions and relying upon above decisions, Mr. KP Raval, learned APP appearing on behalf of the State has requested to allow Criminal Appeal No. 1214 of 2011.

Submission on behalf of the Ori. accused No. 1:

5.03. Mr. Mrudul Barot, learned advocate appearing on behalf of the original accused No. 1 has vehemently submitted that when by giving cogent reasons the learned trial court has imposed sentence of 5 years RI for the offence u/s. 307 and 326 of IPC, the same is not required to be interfered with by this Court in exercise of appellate jurisdiction.

5.04. It is submitted by Mr. Mrudul Barot, learned advocate appearing on behalf of the original accused No. 1 has further submitted that as such there were simple injuries received by the injured eye witnesses. It is submitted that even as per the Doctor, the injuries sustained by both the injured witnesses were simple injuries and therefore, the sentence imposed by the learned trial court while convicting the original accused No. 1 for the offence u/ss. 307 and 326 of IPC is not required to be interfered with and same can be said to be adequate punishment.

5.05. In reply, Mr. K.P. Raval, learned APP appearing on behalf of the State has vehemently submitted looking to the conduct on the part of the original accused No. 1 and considering the fact that after the first quarrel the original accused No. 1 had gone and thereafter he again came at the place of incident after half an hour with knife having total length of 12.5 inches. and caused injuries on both

the accused Kishor on the back side and on the face, and therefore, the intention and motive of the accused No. 1 is required to be considered. He has submitted that what is required to be considered is the intention and not the injury.

By making above submissions, he has requested to allow Criminal Appeal No. 1214 of 2011 and impose maximum punishment upon the original accused No. 1 provided for the offence u/ss. 307 and 326 of IPC.

6. Criminal Appeal No. 1213 of 2011:

6.01. Now, so far as Criminal Appeal No. 1213 of 2011 preferred by the State challenging the impugned judgement and order of acquittal passed by the learned trial court acquitting the original accused Nos. 2 to 4 is concerned, Mr. K.P. Raval, learned APP appearing on behalf of the State has vehemently submitted that as such the of all the accused Nos. 2 to 4 are named in the FIR and they were present at the time of incident and their names have been disclosed even in their names have been disclosed in the FIR as well as deposition of the injured eye witnesses. It is submitted that it was specifically stated that all of them accused injuries on the injured witness by Dhoka and gave kick and fist blows. It is submitted that in view of the deposition of the injured eye witnesses PW Nos. 1 and 3, the learned trial court has materially erred in acquitting the original accused Nos. 2 to 4.

By making above submissions it is requested to allow Criminal Appeal No. 1213 of 2011 preferred by the State challenging acquittal of the accused Nos. 2 to 4 and quash and set aside the impugned judgement and order of acquittal passed by the learned trial court and consequently convict the original accused Nos. 2 to 4 for the offences for which they were tried.

Submissions on behalf of the accused Nos. 2 to 4:

6.02. Mr. Barot, learned advocate appearing on behalf of the original accused Nos. 2 to 4 has vehemently opposed the appeal preferred by the State challenging the impugned judgement and order of acquittal acquitting the original accused Nos. 2 to 4. It is submitted that present appeal is against the judgement and order of acquittal and as per the catena of decisions and law laid down by the Hon"ble Supreme Court, unless and until it is found that the findings recorded by the learned trial court are perverse and/or contrary to the evidence on record, and the same has resulted in miscarriage of justice, appellate court is not justified in interfering with the order of acquittal.

6.03. Mr. Barot, learned advocate appearing on behalf of the original accused Nos. 2 to 4 has further submitted that in the present case, even no specific overt act has been alleged to the original accused Nos. 2 to 4. It is submitted that even in the deposition of the injured eye witness, they have categorically stated that they are not able to say which accused had given which blow and by which weapon. It is submitted that though it was stated by the injured eye witnesses that the accused Nos. 2 to 4 inflicted injuries by Dhoka and kick and fist blows,

however the same has not been established and proved by medical evidences. It is submitted that no injury on any of the injured eye witness has been found which could have been caused by Dhoka, as alleged.

6.04. Mr. Barot, learned advocate appearing on behalf of the original accused Nos. 2 to 4 has further submitted that in the facts and circumstances of the case and considering the material contradictions, when the learned trial court by giving cogent reasons and on appreciation of evidence has acquitted the original accused Nos. 2 to 4, the same is not required to be interfered with by this Court in exercise of appellate jurisdiction.

By making above submissions, it is requested to dismiss the appeal preferred by the State for enhancement and confirm the impugned judgement and order of acquittal acquitting the original accused Nos. 2 to 4.

7. Heard the learned advocates appearing on behalf of the respective parties at length.

7.01. Now so far as Criminal Appeal No. 1145 of 2011 preferred by the original accused No. 1 challenging the conviction for the offences punishable under sections 307, 326, 323 and 324 of Indian Penal Code is concerned, at the outset, it is required to be noted that the name of the original accused No. 1 has been disclosed by the injured eye witness and the complainant from the very beginning in the First Information Report. The original complainant in the First Information Report has categorically stated and disclosed that the original accused No. 1 named Kishorbhai Kanabhai Rathod inflicted injury on him by knife. The same is corroborated by the deposition of the PW Nos. 1 and 3 - injured eye witnesses. Even before the Doctor, at the time of giving history in the hospital, the name of the original accused No. 1 was specifically disclosed by the injured witnesses and it was stated that the original accused No. 1 named Kishorbhai Kanabhai Rathod gave knife blow on the complainant. The same is so stated in the medical certificates issued by the Doctor produced at Ex. Nos. 22 and 23 and same is established and proved by the prosecution by examining the Dr. Devershi Bhatt PW No. 6 who has been examined at Ex. 21. The said Doctor is an independent witness and there is no reason to doubt the deposition of the Doctor. Thus, the history given by the original complainant so mentioned in the Certificates produced at Ex. Nos. 22 and 23 have been established and proved by the prosecution. It is also required to be noted that as such there is a discovery of panchnama of knife used by the original accused No. 1 in commission of the offence at the instance of the original accused No. 1. The knife used by the original accused No. 1 in commission of the offence has been recovered at the instance of the original accused No. 1 and from the place shown by the by the original accused No. 1 and from the place which was known to the original accused No. 1 alone. Though the Panch witnesses of the discovery panchnama have turned hostile, the discovery panchnama has been established and proved by the prosecution by examining the investigating officer. The discovery panchnama has been proved through the deposition of investigation officer. It is

required to be noted that as such no question has been asked by defence in the cross-examination of the investigating officer doubting the discovery of the knife at the instance of the original accused No. 1. Thus, the discovery of the knife has been established and proved by the prosecution by leading cogent evidence. The injuries sustained by the injured witnesses caused by the original accused No. 1 by knife has been established and proved. The doctor in his deposition has specifically stated that the injuries sustained by the injured witnesses were possible by knife which was recovered at the instance of the original accused No. 1. Considering the facts and circumstances of the case, when the learned trial court has convicted the original accused No. 1 for the offences punishable under sections 307, 326, 324, 323 of Indian Penal Code and under section 135 of Bombay Police Act, it cannot be said that the learned trial court has committed any error which calls for interference of this court. Under the circumstances, the impugned judgement and order of conviction passed by the learned trial court convicting the original accused No. 1 is hereby confirmed.

7.02. Now, so far as Criminal Appeal No. 1214 of 2011 preferred by the State for enhancement of the sentence imposed by the learned trial court while convicting the original accused No. 1 for the offences punishable under sections 307, 326, 324, 323 of Indian Penal Code and under section 135 of Bombay Police Act is concerned, at the outset, it is required to be noted that while convicting the original accused No. 1, the learned trial court has imposed sentence of only 5 years RI for the offences punishable under sections 307 and 326. It is required to be noted and it cannot be disputed that as per the law laid down by the Hon''ble Supreme Court in catena of decisions, sentence must be adequate and commensurate with the gravity of the offence.

7.03. In the case of Sumer Singh v. Surajbhan Singh and others, , (2014) 7 SCC 323, 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."

7.4. Again in the case of *Narinder Singh and others v. State of Punjab and another*, (2014) 6 SCC 466, 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-?-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.

19. 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 conflicting 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."

7.5. While considering the minimum sentence provided under Section 376(2) of the IPC the Hon'ble Supreme Court in the case of State of Karnataka v. Krishnappa, , (2000) 4 SCC 75 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*, ,

s(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."

7.06. 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 v. State of Haryana, , (2014) 13 SCC 318, 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 realize, 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.

7.07. 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, it appears that while awarding sentence the learned trial Court has not properly appreciated and/or considered the gravity of the offence committed by the accused.

7.08. In the facts and circumstances of the case, we are of the opinion that while convicting the original accused for the offence under Sections 307 and 326 of the Indian Penal Code, if the sentence of 5 years RI is enhanced to 7 years RI, with fine and in default punishment imposed by the learned trial court, the same can be said to be just, adequate punishment and commensurate with the gravity of the offence. To the aforesaid extent, the impugned judgment and order of conviction passed by the learned trial Court acquitting the original accused No. 1 is required to be modified.

7.09. In the present case, it is the case on behalf of the original accused No. 1 that as per the Doctor, injuries sustained by the injured eye witnesses were simple in nature and therefore, in the facts and circumstances of the case the learned trial court has not committed any error in imposing sentence of 5 years for the offences punishable under sections 307 and 326 of Indian Penal Code. However, the conduct of the accused No. 1 is required to be considered. It has been established and proved that after the first incident, the accused were scolded for gambling, and the accused subsequently after half an hour came back with knife having total length of 12.5 inches. and inflicted injuries on the injured witnesses. Therefore, what is required to be considered is the intention and not the injury sustained. Even the injuries sustained by the injured witnesses can be said to be on the vital part of the body i.e. on the back and face - near eye. Considering the facts and circumstances of the case and decision of the Hon"ble Supreme Court refereed to hereinabove, it cannot be said that awarding 5 years RI for the offence under section 307 can be said to be adequate punishment commensurate with the gravity of the offence. In the facts and circumstances of the case, we are of the opinion that if the sentence is increased

from 5 years RI to 7 years RI, while maintaining the conviction of the original accused No. 1 for the offences punishable under sections 307 and 326 of Indian Penal Code, it can be said to be just punishment commensurate with the gravity of the offence. To the aforesaid extent, the appeal of the State for enhancement is required to be allowed and the impugned judgement and order of conviction is required to be modified.

7.10. Now, so far as the Criminal Appeal No. 1213 of 2011 preferred by the State challenging the judgement and order of acquittal passed by the learned trial court acquitting the original accused Nos. 2 to 4 is concerned, at the outset, it is required to be noted that by giving cogent reasons, the learned trial court has acquitted the original accused Nos. 2 to 4. We are of the opinion that the findings recorded by the learned trial court acquitting the original accused Nos. 2 to 4 are on appreciation of evidence which cannot be said to be perverse and/or contrary to the evidence on record.

7.11. It is required to be noted that the injured witnesses stated that the original accused Nos. 2 to 4 were there and they caused injuries to them by Dhoka and kick and fist blows. However, both the injured eye witnesses have categorically stated that they cannot say that who caused which injury and by what.

7.12. Apart from the above, even there is no specific overt act attributed to the original accused Nos. 2 to 4. Even otherwise, no injuries are found alleged to have been caused by Dhoka. Under the circumstances, the alleged injuries by any of the accused Nos. 2 to 4 by Dhoka and kick and fist blows are not established and proved by prosecution by leading cogent evidence.

7.13. Considering the aforesaid facts and circumstances of the case, when the learned trial court has acquitted the original accused Nos. 2 to 4, the same is not required to be interfered with by this Court in exercise of appellate jurisdiction. The case does not fall in any of the exceptions to exercise jurisdiction of the appellate court while interfering with the order of acquittal. In view of the above and for the reasons stated above.

8. In view of the above and for the reasons stated above, Criminal Appeal No. 1145 of 2011 preferred by original accused No. 1 challenging his conviction for the offences punishable under sections 307, 326, 323 and 324 of the Indian Penal Code, 1860 is hereby dismissed and the conviction of original accused No. 1 for the aforesaid offences is hereby confirmed.

Criminal Appeal No. 1213 of 2011 preferred by the State against the impugned judgment and order of acquittal passed by the learned Sessions Judge in Sessions Case No. 215 of 2007 acquitting original accused Nos. 2 to 4 respondents herein is hereby dismissed and the acquittal of original accused Nos. 2 to 4 is hereby confirmed.

Criminal Appeal No. 1214 of 2011 preferred by the State for enhancement of sentence imposed by the learned Sessions Judge, Bhavnagar while convicting the

original accused No. 1 for the offences punishable under sections 307, 326, 323, 324 of the Indian Penal Code, 1860 is hereby partly allowed and respondent herein original accused No. 1 is hereby directed to undergo 7 years RI with fine and the default sentence imposed by the learned trial Court is maintained for the offence punishable under section 307 of the IPC. It is reported that original accused No. 1 respondent in Criminal Appeal No. 1214 of 2011 and appellant in Criminal Appeal No. 1145 of 2011 is on bail. His conviction being confirmed, his bail bond stands canceled. Time to surrender by the original accused is hereby granted upto 29/2/2016.