REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1365 OF 2008

(Arising out of SLP (Crl.) No. 5967 of 2006)

State of Punjab ....Appellant

Versus

Rakesh Kumar ....Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a learned Single Judge of the Punjab and Haryana High Court. Respondent (hereinafter referred to as the 'accused') was found guilty of offence punishable under Sections 366 & 376

of the Indian Penal Code, 1860 (in short the 'IPC') and was sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.500/- with default stipulation in respect of offence punishable under Section 366 IPC and 7 years rigorous imprisonment for the offence relatable to Section 376 IPC and to pay a fine of Rs.500/-. Though the conviction as recorded by learned Additional Sessions Judge, Patiala, was affirmed by the High Court it reduced the sentence to the period undergone. The reason for such reduction appears from the cryptic order of the High Court that the appellant was aged about 19 years at the time of his statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.) and the victim and the accused appeared to be in love with each other as is evident from love letters.

3. Learned counsel for the appellant-State submitted that the parameters relating to imposition of lesser sentence for offence relatable to Section 376 IPC have not been kept in view.

4. Learned counsel for the respondent-accused on the other hand supported the judgment of the High Court.

5. The crucial question which needs to be decided is the proper sentence and whether merely because of lapse of time or that the accused belonged to rural areas, the accused is to be waived from undergoing it. It is to be noted that the sentences prescribed for offences relatable to Section 376 are imprisonment for life or up to a period of 10 years.

6. The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Sections 375, 376, 376-A, 376-B, 376-C, and 376-D. 'Rape' is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, i.e. 376-A, 376-B, 376-C and 376-D. The fact that

sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-b); or as expressed more fully,' rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will' (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon.6, 1a, 9 Edw. 4, 26 a (Hale PC 628). In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's "Criminal Law" 9th Ed. p.262). In 'Encyclopoedia of Crime and Justice' (Volume 4, page 1356) it is stated ".....even slight penetration

is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

7. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame.

8. 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. For instance a murder committed due to deep-

seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In Mahesh v. State of M.P. (1987) 2 SCR 710), this Court while refusing to reduce the death sentence observed thus:

> "It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."

9. 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. v. State of Tamil Naidu (AIR 1991 SC 1463).

10. 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.

11. 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.

12. 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 L.D. 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.

13. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping,

misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

14. In Dhananjoy Chatterjee v. State of W.B. (1994 (2) SCC 220), this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals 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.

15. These aspects have been elaborated in State of M.P. v. Ghanshyam Singh (2003(8) SCC 13).

16. In both sub-sections (1) and (2) of Section 376 minimum sentences are prescribed.

17. Both in cases of sub-sections (1) and (2) the Court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for 'adequate and special reasons'. If the Court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum.

18. In order to exercise the discretion of reducing the sentence the statutory requirement is that the Court has to record "adequate and special reasons" in the judgment and not fanciful reasons which would permit the Court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no strait-jacket formula can be indicated. What is applicable to trial Courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. The only reason indicated by the High Court is that the accused belonged to rural areas. The same can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative.

19. Undisputedly, the victim was less than 16 years of age at the time of occurrence. Evidence also shows that the victim and accused were in love and the victim admitted that she had sexual intercourse with the accused because of that.

That of course has no relevance because of her age being less than sixteen years. The father of the victim had also filed an affidavit before the High Court that since the victim is settled in life a liberal view may be taken so far as sentence is concerned.

20. Considering all these facts, as was done in Iqbal v. State of Kerala, Criminal Appeal No.1463 of 2007 decided on 24.10.2007, the sentence is fixed at 3 years RI and fine of Rs.10,000/- to be deposited within three months. In case of default in making deposit, default sentence shall be one year. In case deposit is made, a sum of Rs.8,000/- shall be paid to the victim.

21. The respondent is directed to surrender to custody forthwith to serve the remainder of the sentence. The appeal is allowed to the extent indicated.

.....J.

(Dr. ARIJIT PASAYAT)

.....J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi
August 29, 2008