

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve :10.09.2009.

Date of Decision:23.09.2009.

+ Cr1.App.269/2007

1. JATAN SINGH
S/o Ishwari Parsad
2. AVADH NARAIN @ LOTAN
S/o Ram Naresh
3. KANCHAN
S/o Jhuri Ram
4. DHANRI DEVI
W/o Avadh Narain
5. PHOOL KUMARI
W/o Jatan Singh

..... Appellants

Through: Mr. K.N. Balgopal, Sr. Adv.
with Mr. Mohinder Saini, adv.

Versus

STATE OF NCT DELHI Respondent

Through: Mr. Navin Sharma, APP.

WITH

Crl.Rev.P.526/2007

PHOOL KUMARI Petitioner

Through: Mr. K.N. Balgopal, Sr. Adv.
with Mr. Mohinder Saini, adv.

Versus

STATE & ANR. Respondents

Through: Mr. Navin Sharma, APP.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

: **MOOL CHAND GARG,J**

1. This common order shall dispose of the Criminal Appeal No. 269/2007 which has been filed by Jatan Singh and others against the order passed by the Additional Sessions Judge in Sessions Case No.105/2006 arising out of FIR No.487/1995 registered at the instance of Om Prakash, the complainant, alleging emasculation of his private part (penis) and causing other injuries by the accused persons/appellants to him which resulted in the conviction of the appellants for the offences under Sections 342/323/307 read with Section 34 IPC and passing of the order on sentence directing the appellants No.1 to 3 and 5 to undergo R.I. for a period of one year for the offence punishable under Section 323 read with Section 34 IPC and also to undergo R.I. for one year under Section 342 read with Section 34 IPC. They were further sentenced to RI for a period of 10 years and were also imposed a fine of Rs.10,000 each for the offences punishable under Section 307 read with Section 34 IPC. In default of

payment of fine they were further sentenced to undergo S.I. for three months each. Appellant No.4, however, was sentenced to RI for a period of one year under Section 342 IPC, R.I. for a period of one year under Section 323 IPC and R.I. for a period of three years under Section 307 read with Section 34 IPC with a fine of Rs.5000/-. In default, the said appellant was sentenced to undergo SI for two months.

2. One of the accused, namely, Usha was a juvenile and she had been acquitted by Juvenile Court as one of the witnesses did not appear in that case. One of the appellants, namely, Dhanri Devi, has been granted bail under the orders of Hon'ble Supreme Court. All the appellants have almost undergone R.I. for 2 and a half years during the course of hearing of this appeal and the trial of the case.

3. The Second case which shall also be disposed of by this order is the Criminal Revision Petition No.526/2007, filed by Phool Kumari (One of the appellants in Crl.App.269/2007), the complainant in that case against order of acquittal passed by the ASJ vide separate judgment in Sessions Case No.18/2006 which arose out of the complaint filed by Phool Kumari against Om Prakash registered as FIR No. 488/1995 under Sections 452/376/511 IPC in which Om Prakash have been acquitted. According to the complainant, the said

order is required to be reversed.

4. Insofar as FIR No.487/1995 is concerned, it was registered by the Police on the basis of information received by them. The police reached at the spot and found Om Prakash in an injured unconscious position, including emasculation of his private part, the police brought Om Prakash to the hospital. After initial treatment, Om Prakash was declared fit to make a statement and on that basis the statement was recorded by the police, which is the complaint in that case and has resulted in the FIR No. 487/1995.

5. After investigation of the said case, the police filed a challan against the appellants including Usha Kumari under Sections 323/342/326/34 IPC alleging that Om Prakash was called by Phool Kumari through her younger sister Usha Kumari at their residence on 09.08.1995 where all the accused persons, with a common intention, injured Om Prakash and also emasculated his private part (penis) and thereby caused offences under Sections 307/308/34. The case was committed to sessions when charges were framed against all the appellants (except Usha Kumari, who was sent to Juvenile Court) under Sections 342/323/307/34 IPC. The learned ASJ after holding the trial in the case in which the prosecution examined 17 witnesses including One Tara, PW-12, convicted the appellants and

sentenced them as aforesaid.

6. The case, subject matter of Crl.Rev.P.526/2007, was initiated on the complaint made by Phool Kumari that Om Prakash reached at her house and tried to commit rape on her and it was at that time that Phool Kumari along with her sister emasculated the private parts of Om Prakash to save her honour. On the basis of the said complaint, initially, no case was registered but after revision was filed by the complainant, Phool Kumari and the matter reached up to the Apex Court, the police filed a challan alleging offences having been committed by Om Prakash under Sections 452/376/511 IPC. The said case was registered as Sessions Case No.18/2006 and was simultaneously tried by the same ASJ. In that case, six witnesses were examined by the prosecution including Phool Kumari and Usha Kumari. However, the trial Court, disbelieved the version of Phool Kumari while acquitting Om Prakash in that case vide separate judgment dated 16.03.2007.

7. In the appeal, the learned counsel appearing for the appellants has submitted that taking into consideration the evidence which came on record in both the cases while it is not disputed that the private part of Om Prakash was emasculated but the facts which have been narrated by the prosecution in FIR No.488/1995 have not

been correctly appreciated. It has been further submitted that, in fact, if the testimony of Om Prakash is scrutinized and statement of Phool Kumari is appreciated, it would be seen that Om Prakash was a self confessed liar and has tried to cook up a story only to save himself from the offences committed by him of attempting to commit rape on Phool Kumari and because of that, the action of Phool Kumari comes in the definition of self-defense which entitles the appellants to be acquitted of the charges whereas the case of the complainant, Phool Kumari against Om Prakash is required to be accepted and Om Prakash is liable to be punished.

8. I have heard the submissions from both the parties and examined the records of both the cases. I have also gone through the judgments given by the ASJ in both the matters. It would be appropriate to take note of the case set up by Phool Kumari against Om Prakash in her complaint, where she has stated like this:

“bayan kiya ki main pata uprokt par apne mata pita ke saath rehti hoon. meri shaadi 21 May 1995 ko Jatan Singh, S/o Ishwar Singh, R/o E487, Gali No.9, West Vinod Nagar Delhi ke saath hui thi. Main pehle Om Prakash, S/o Ram Lal, R/o Extra 30/435, Trilokpuri, Delhi se 3 saal se pyaar karti thi. Shaadi hone ke baad main ne us se pyaar karna chhod diya. Kal raat ko main apni behan Usha ke saath apne makaan ke uparwaali chat par so rahi thi ki waqt kareeb 1 baje raat Om Prakash mere paas aaya aur mera nara (salwar ka) khol liya aur mere saath galat kaam karne ki koshish karne laga iska main ne virodh kiya to is kheenchtaan me meri behan Usha jag gayi jo hum dono ne iska virodh kiya. Yeh nahi maana to meri

behan Usha ne Om Prakash ko pakad liya aur maine sabji kaatne waali chhuri se Om Prakash ka guptang alag kaat kar chat par hi daal diya. Uske khoon behane laga. Yeh harkat maine Om Prakash se apni ijjat bachane ke liye apni behan ki madad se kiya. Uske khilaaf kanooni karwahi ki jaye”

9. The witnesses cited by her to support her case are her own family members and does not include any neighbor.

10. On the other hand, case FIR No. 487/1995 is based upon the statement made by Om Prakash, who made a statement to the police to the following effect:

“Bayan Ajane Om Prakash S/o Sh Ram Lal Rai R/o 30/495 Trilok Puri Delhi uder section 161 CrpC

“Bayan Kiya ki.....

Dinank 04.08.1995 ki karib 12:30 baje jab mein apne ghar ke bahar silli ke uppar leta hua tha to phool ki choti behan usha mere pass aayi aur mujhe yeh kehkar le gai ki do minute chalon papa baat karenge tumse kuch puchenge fir tum vapis aa jana . jo ki mein uske sath uske ghar pahuncha jaise hi unke ghar ke andar pahunchato USha @baby ne baha se darwaza band kar diya aur us kamre mein andhera thajo mere ghust hi mere peeche garden par jor mara jo hath lagte hi mein kamre mein do kadam aura age chala gaya uske baad mere sharer par laat ghunse padne lage jo is dauran mujhe un logon ki awaz aa rahin thi “sale ko maar do “jo is dauran mera muh band kar diya jis se meri awaz na nikal saki aur gale par kapda baandh diya. Jitni bhi aawazin aa rahin thi voh maartein samay maine unki awz pehchan lit hi voh jatan Singh @ Master avadh narain ki ghar wali is tarah maara peeta mein behosh ho gaya tha uske baad mujhe kuch nahin pata mere sath kya ho raha hein kya nahin jo aaj mujhe patti badlne ke dauran maaloom hua hein ke mera guptaang nahin hein keval gadha sa hein. Aaj apne mera bayan liya hein.

11. Om Prakash has supported his version before the ASJ while appearing as PW2. He has also deposed as under:

On 7.8.1995, Phool Kumari sent one letter to me through her younger sister Usha and she showed her willingness to meet me. Even after the receipt of this letter I did not go to meet her. On 8.8.1995, I again received a letter through her younger sister. And even on that day, I did not go to meet her after reading it and kept the letter in my pocket. On 9.8.1995, when I was sleeping and it was the midnight, and was so sleeping on the PATHAR SILLI (stone slab) outside my house, Phool Kumari's younger sister whose name is Usha came to me and asked me to accompany her telling me that I was called by her father. She told me that I may come in short time. Usha had asked me to come to her for two minutes. On this I accompanied Usha to her house. There is a PATHAR SILLI outside the house of Usha also. The door of the house of Usha is very close next to that Pathar Silli and the moment I had put my feet on that pathar silli someone pushed me by hand from the back of my neck. I got pushed inside the house. Thereafter, Usha closed the door of the house from outside. All the accused persons present in the Court were inside the house when I had got pushed inside the house. Thereafter, the accused persons gave me legs and fists blows. I was given much beatings by the accused persons and could not run away and during the course of the beatings given to me accused Avadh Narayan present in the Court has exhorted "BACH NAA PAYE MAAR DO IS SALEY KO". During that course, a cloth which was Rumaal type (alike handkerchief) was tied around my neck and my mouth was also stuffed with some papers. And after some time I lost consciousness and I could not cry. Thereafter, I regained consciousness in the hospital after two days and found that my male organ was missing, there was only a Gadha. I remained in the Safdarjung Hospital for about 2 $\frac{3}{4}$ months (Paune Teen Months) and police had also made enquiries from me. After being discharged from the hospital when I came back from the house, I handed over the letters of Phool Kumari which were received from Phool Kumari prior to the incident to the police. I identify my signatures at point A on the seizure

memo of letters Ex.PW2/A. The letters of Phool Kumari received by me and which are on the record are Ex.PW2/1, PW2/2 (2 pages), PW2/3 (2 pages), PW2/4(1 page), PW2/5 (one page) and PW 2/6 (one Page), I identify Avadh Narayan, Jatan Singh, Avadh Narayan's Wife, her daughter Phool Kumari and Kanchan. brother-in-law of Avadh Narayan"

12. His version is also supported by PW12, Tara who is the eye-witness of the incident. She has deposed like this.

"I have been residing at the above said address for the last 10 years. I know the accused Avadh Narain present in the Court and also the other accused persons who are present in Court, i.e., wife, daughter, son-in-law and brother-in-law of Avadh Narain. I do not remember the date but it was 4 & 4 ½ years ago. On the night of Rakhi, I went to terrace at about 11 pm as there was no light. At about 2 or 2:30 am when I awaken. I smelled liquor. I got up and I saw Phool Kumari on her terrace, which is adjacent to our roof/terrace. On seeing me she became nervous and enquired me as to why I have not slept. In the meantime Phool Kumari's younger sister Usha who was already present there came to me and told me 'there everything is completed and I did not hear anything?' thereafter Phool Kumari shouted much and continuously to which number of persons gathered there on roof and saw Omi whom I knew earlier being neighbourer was also shouting 'hoo-hoo' (moaning). Phool Kumari was there during the whole episode and thereafter I do not know. thereafter I do not know but I noticed one bedding (gadda) which is lying near the roof staircase, after hearing of that Omi. The Phool Kumari, Usha were visible to me and I also see Omi there on roof when he was moaning."

13. However, perusal of the two statements goes to show that the case of the prosecution in FIR No 488/1995 against other accused persons has not been substantiated. None of these witnesses have deposed about the role of other appellants, except the appellant Phool Kumari and Usha who was tried by a juvenile Court, regarding

emasculatation of the private part of PW2, Om Prakash and which fact has not even been disputed by Phool Kumari and Usha in their counter case filed against Om Prakash. It is submitted that in the absence of any evidence regarding role of the other appellants, namely, Jatan Singh, Avadh Narain and Dhanri Devi, the conviction fastened upon them for having emasculated the penis of Om Prakash cannot be sustained. It is also submitted that the statement given by Om Prakash, even otherwise, does not inspire confidence as there are many contradictions in his statement about the factum of his reaching at the spot. According to the prosecution, he was called by Usha at a place where impugned act has been committed whereas the case of Phool Kumari in her counter complaint had been that he came at the spot himself and wanted to rape her.

14. It is a matter of record that learned ASJ who also tried the counter case has not found the version of Phool Kumari and the witnesses cited by her truthful or reliable so as to accept her story. In this regard, following points have been raised:

15. Statement made by Phool Kumari and Usha before the MM goes to show that the version of Phool Kumari and Usha is different than what they have deposed in the Court in that case, it would be appropriate to take note of the statements made by these persons

before the Magistrate and before the ASJ. The statement before the Magistrate was made when Phool Kumari was prosecuting her complaint on the basis of which earlier, no case was registered but later on a challan was filed. The relevant portion of the statements made by Usha before MM reads as under:

“I found that one boy/men was forcing upon my sister and was outraging her modesty and the said men whose name was Om Prakash was living in our Gali after some distance. The said Om Prakash was attempting to insult my sister and was attempting to rape her and the said Om Prakash had torn of the cloths of my sister and had also loosen the cord (nara) of the salvar of my sister and was forcing upon her badly and my sister was screaming furiously and on seeing this I also started screaming. On which the neighbours who were sleeping on their roof had also gathered on the roof of my house and a crowd was formed there gathered on the roof of my house and a crowd was formed there and the said perons/crowd started beating the Om Prakash and thereafter I had came down from the roof of my house”

The statement made by Usha before learned ASJ reads as under:

“The accused was residing near my house since quite long prior to the incident but I do not know his exact name. I do not remember who was residing in the adjacent houses at the time of the incident.”

16. In view of the aforesaid contradictions in the statement of Phool Kumari and Usha who admittedly emasculated the penis of Om Prakash, there is no reason to disbelieve the version of prosecution relying upon the statement of Tara and Om Prakash to the extent that

the emasculation of the penis of Om Prakash took place because of the active involvement of Phool Kumari and Usha. As such no infirmity can be found in the approach of the trial Judge while convicting the appellant Phool Kumari in this case. However, the judgment of the trial Court regarding others is without any basis.

17. One of the arguments addressed on behalf of the appellant was that the counter case was decided by the ASJ simply because the prosecution case in FIR No.487/1995 has been accepted. However, a perusal of the judgment delivered by the ASJ in the case of State Vs. Om Prakash goes to show that the said judgment is not based upon the conclusions drawn in the trial of Phool Kumari and Ors in FIR No.488/1995. The reasons given for acquittal as appears in the judgment are reproduced hereunder:

“15. Thus, the entire case of the prosecution is shrouded in serious doubt. The testimonies of all the witnesses are not worth reliance and they all appear to be interested witnesses. It further becomes clear that they have made this case to protect themselves and as a measure of defence to the cross case registered on the complaint of the accused. I do not find any substance in the allegations and accordingly, accused Om Prakash is acquitted of the offences punishable under Sections 452/354 IPC. He be set at liberty. His personal bond and surety bond are discharged.”

18. In view of the aforesaid, I do not find any infirmity in the two judgments delivered by the trial Judge. However, the conviction of Jatan Singh cannot be sustained.

19. It may also be observed here that the plea of self defence/right of private defence raised by Phool Kumari before this Court in Revision Petition filed by her inasmuch as the benefit of private defense cannot be availed by the aggressor who is armed and in a mood to take revenge but the benefit of doubt should be given to complainant, Om Prakash, who was unarmed and was a victim of such a heinous act done by the accused persons. Reference in this regard can be made to some of the judgments delivered by Apex Court in

a) Krishna & Anr. Vs. State of U.P. AIR 2007 SC 2452
wherein it has been observed

15. The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived

and; b) Satnarain Vs. State of Haryana AIR 2008 SC 999
where it has been observed:

17.....We are equally aware of settled legal position

that the onus of proof on the accused as to exercise of right of private defence is not as heavy as on the prosecution to prove guilt of the accused and it is sufficient for him to prove the defence on the touchstone of preponderance of probability. But in the instant case, from the facts and evidence on record, the right of self defence was not at all available to the appellant. The complainant party was unarmed and also not an aggressor. It was the appellant, who came with a loaded gun and fired shots one after the other which resulted in death of Chhotu Ram, injury to Sakeela, though Ravinder Kumar could avoid the shot and remained unhurt. The gun was re-loaded by the appellant which goes a long way to exhibit his intention to finish the complainant side.

20. On the point of sentence, counsel for the petitioner has placed reliance on the judgment delivered by Apex Court in Modi Ram, Lal Vs. State of Maharashtra, 1973 SCC (Cri) 45 where in similar facts, appellant, Modi Ram was convicted for cutting the male organ and Chunni Lal and Lala for cutting off his nose. In the aforesaid case while discussing the policy of sentence it was observed:--

4. The only question with which we are concerned, as observed at the very outset of the judgment, is the question of sentence. The conviction has to be held to be fully justified on the record. Now the question of sentence is always a difficult and complex question. The accused persons found guilty may be hardened or professional criminals having taken to the life of crime since long, or they may have taken to crime only recently or may have committed the crime under the influence of bad company or again commission of a solitary offence may be due to provocative wrongful action seriously injuring the feelings and sentiments of the accused. Human nature being what it is men are at times moved by the impulse of the moment rather than by rational, cool, calculated estimate of the future good and evil. At such moments they are ordinarily inclined to be ready to face any future evil

falling short of the inevitable. Keeping in view the broad object of punishment of criminals by courts in all progressive civilised societies true dictates of justice seem to us to demand that all the attending relevant circumstances should be taken into account for determining the proper and just sentence. The sentence should bring home to the guilty party the consciousness that the offence committed by him was against his own interest as also against the interests of the society of which he happens to be a member. In considering the adequacy of the sentence which neither be too severe nor too lenient the court has, therefore, to keep in mind the motive and magnitude of the offence, the circumstances in which it was committed and the age and character (including his antecedents) and station in life of the offender. In the present case it is obvious that there was grave provocation for Modi Ram who quite naturally felt extremely hurt by Chunni Lal's conduct in seducing the former's wife and thereafter living in the same vicinity. The occurrence is said to have taken place within about twenty-five or twenty-six days after the alleged Natta marriage between Chunni Lal and Janibai. The motive, therefore, does not seem to us to render the offence to be such as to require the very severe sentence of eight years of imprisonment, as has been imposed by the High Court. The magnitude of the offence is undoubtedly a factor ⁶³³ which goes against the appellants. But here again, keeping in view, the normal emotions and feelings of an average human being, the nature of Chunni Lal's act which caused provocation to Modi Ram, and the sense of humiliation it must have brought to the appellant in his social life, we consider that the two injuries, though serious enough to call for a sentence of imprisonment of more than one year's rigorous imprisonment, would not justify as heavy a sentence as has been imposed by the High Court. This important aspect was completely ignored by the High Court. So far as the question of the character and antecedents of the offender is concerned, we do not find anything on the record which would justify the abnormally harsh sentence imposed on him. The High Court also seems to us not to have been quite right in observing that in no case of nose cutting was ever a sentence of less than five years imposed by any court. This infirmity in the impugned judgment would clearly justify review of the sentence by this Court. As a result of this infirmity and that of ignoring the gravity of the provocation, the sentence imposed by the High Court seems to us to have occasioned failure of justice. In our view, therefore, the ends of justice would be amply met if both the appellants are sentenced to three years' rigorous imprisonment. We accordingly allow the appeal only

to the extent of reducing the sentence imposed by the High Court from eight years to three years rigorous imprisonment.

21. However, in the present case, it is apparent that Om Prakash was called at the place of occurrence with pre-determined notion. Nothing is on record which goes to show that after the incident the victim was rehabilitated as held in Modi Ram's case (Supra).

22. Yet taking into consideration that appellant Phool Kumari is a lady and is having minor children to look after, the sentence awarded to her is reduced under Section 307/34 IPC while maintaining her conviction in respect of other charges. She be released after completing 5 years of R.I.

23. Insofar as Jatan Singh, Avadh Narain @ Lotan, Kanchan and Dhanri Devi are concerned, since there is no direct evidence against them in the statement made by PW2 Om Prakash or by PW12, Tara, therefore, they are acquitted of the charges levelled against them by giving benefit of doubt.

24. Consequently, appeal filed by Phool Kumari is partly allowed and Revision is dismissed.

25. Pending applications, if any, shall also stand disposed of.

MOOL CHAND GARG, J.

SEPTEMBER 23, 2009/anb