

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**RESERVED ON : 04.05.2011**  
**PRONOUNCED ON : 20.05.2011**

+ **CRL.A.21/2011**

STATE GNCT OF DELHI ..... Appellant  
Through : Shri Sanjeev Bhandari, ASC for the State.

versus

MUKESH ..... Respondent  
Through : Mr.A.J. Bhambhani with Ms. Nisha Bhambhani,  
Mr. Victor Ahanthem, Advocates along with  
respondent in person.

**CORAM:**

**MR. JUSTICE S. RAVINDRA BHAT**  
**MR. JUSTICE G.P. MITTAL**

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|----|---------------------------------------------------------------------------|-----|
| 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 |

**MR. JUSTICE S.RAVINDRA BHAT**

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1. The State had appealed against the judgment and order of the learned Additional Sessions Judge in SC 80/2008. By the said judgment, the respondent was convicted for the offences punishable under Sections 363 and 376/511 of IPC. The state contends that the sentence imposed was inadequate, and calls for its enhancement.

2. The facts, as found by the Trial Court, were that on 17.03.2008, the prosecutrix's father handed over the respondent (accused before the Trial Court), at about 3:45 PM. The police recorded the receipt of complaint, and the minor prosecutrix's statement, in her father's presence. She stated that when she was playing in the street, the respondent, a neighbour took her to his room, saying that he would show a movie. He then switched on a television, showing obscene pictures. When the prosecutrix said that the movie was obscene,

the respondent said that it was good; he removed her underwear and laid her down. The prosecutrix also stated that the respondent lowered his pants, and tried to insert his “urinating organ” (penis) into her “urinating place” which resulted in her weeping, and raising a noise. He therefore, left the prosecutrix; she went out to the street, weeping. Her father, who was entering the street, inquired as to what was the matter, when she narrated all the events to him. Her father called out the respondent and caught hold of him, and later handed him over to the police.

3. The police, after recording the FIR and statements of some witnesses, also got the prosecutrix medically examined. The doctor who examined her did not depose during the trial. However, the Medico Legal Certificate (MLC) Ex. PW-11/A was proved by PW-11 another doctor. She said that the patient’s history, recorded in the document revealed that:

*“There is no history of bleeding per vagina, pain perineum or insertion of foreign body in vagina. On examination, general physical examination was found to be normal. Pelvic examination, the hymen was found to be intact. Vulval swab was prepared and both the swab and underwear of the patient was sealed and handed over to the Investigating Officer..”*

4. The respondent was arrested immediately after the incident, and remained in custody throughout. He too was subjected to medical examination. When charged with committing the offence, he denied guilt, and claimed trial. By the impugned judgment, the Trial Court convicted the respondent for the offence of attempt to commit rape under Section 376/511, as well as the offence punishable under Section 363. The Court sentenced the respondent to one year imprisonment and fine, for the latter offence; for the offence of attempted rape, the Court exercised its powers under the proviso to Section 376 (1) and sentenced him to two and a half years’ imprisonment. The respondent completed his sentence. The State preferred its petition for leave to appeal, much later, after expiry of the period of limitation, sometime in January, 2011. The court granted leave on the issue of adequacy of sentence.

5. It was urged by the learned Additional Public Prosecutor (APP) that the Trial Court fell into error in not awarding the minimum sentence, for attempted rape. It was submitted that having regard to the provisions of Sections 57 and 376(1) of the IPC, the sentencing choice was between 10 years and life imprisonment, for the offence of rape; as the court convicted the respondent for attempt, the sentence was to be half. Therefore, the minimum sentence which could have been awarded in the case was 5 years. The judgment reported as *Mohd. Munna v Union of India* 2005 (7) SCC 417 was cited for saying that “life

imprisonment” meant rigorous imprisonment for life, which for the purpose of reckoning fractions, is to be 20 years. It was submitted that having regard to the nature of the offence, the Trial Court did not take into consideration relevant factors while awarding a lighter sentence. The learned APP submitted that while the Court could have given a sentence which was lighter than the minimum prescribed, the reasons for doing so should have been adequate and sound. Attacking the Trial Court’s approach in this context, it was submitted that the reasons given, i.e an ailing old mother, the respondent being the sole earning member of his family, his youth, that he too had a young infant child to be cared for, could not be called “special” for exercising discretion, which had to be on a sounder footing. Emphasizing that discretion should be resorted to judiciously, it was submitted that the crime and the offender had to be justly dealt with, and the sentence awarded had to be proportionate to the crime, having regard to the fact, which plainly was not the case in this instance.

6. Mr. Bhambani, learned *amicus curae* submitted that by virtue of Section 377 (2) while a State appeal on the ground of inadequacy of sentence is permissible, and that the court cannot in such event enhance sentence, without issuing notice to the accused, at the same time, Section 377 (3) enables the accused respondent, in case such an appeal against sentence is preferred, to “*plead for his acquittal or for the reduction of the sentence.*” Thus, the High Court has to consider the case on the merits, when the accused respondent challenges the findings, in an appeal confined only to the question of sentence inadequacy preferred by the State.

7. It was urged that the prosecutrix was not clear about the precise nature of the alleged act committed by the respondent; apart from stating “galat kaam” or wrong action, she did not say anything further, or elaborate. Further, submitted the *amicus*, the evidence on the record was to the effect that the accused had shown an obscene movie. However, the prosecution did not establish how a small, minor girl could differentiate between what was obscene and what was not. It was also urged that the prosecutrix did not initially say anything about the alleged incident, and did so only after the prosecution sought permission to put leading questions and cross-examine her. It was next urged that there was a material discrepancy between the witnesses’ account; whereas PW-2 deposed that statements were recorded in the police station, immediately after the matter was reported, PW-6 deposed that the police went to the prosecutrix’s house, took her and the accused to the police station, and later went to the hospital, after which the statements were recorded.

8. Learned counsel emphasized that since there was no evidence either medical, or ocular, to corroborate the events narrated by the prosecutrix, and the fact that she did so during cross examination by the prosecution – after permission to do so was granted, and further that nothing was found during medical examination of the accused, the finding of guilt, recorded by the Trial Court, for attempted rape, was unsound, and had to be set aside. It was submitted that though the law does not require corroboration of a prosecutrix/ rape victim's testimony, the other materials on record should be credible to justify a conviction. In this case, the court ought to have been even more circumspect, since the prosecutrix was also a child witness.

9. Arguing next about sentence, it was submitted that assuming, though not admitting that the prosecution had proved the accused's guilt, the court should not interfere with the sentencing choice exercised by the Trial Court. The *amicus* relied on *Mohd. Giasuddin v. State of A.P.*, (1977) 3 SCC 287, at page 293, where it was held as follows:

*“16. The new Criminal Procedure Code, 1973, incorporates some of these ideas and gives an opportunity in Section 248(2) to both parties to bring to the notice of the Court facts and circumstances which will help personalise the sentence from a reformatory angle. This Court, in Santa Singh vs. State of Punjab, 1976 (4) SCC 190, has emphasised how fundamental it is to put such provision to dynamic judicial use, while dealing with the analogous provisions in Section 235(2):*

*“This new provision in Section 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code. It was realised that sentencing is an important stage in the process of administration of criminal justice — as important as the adjudication of guilt — and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the Court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the Court.*

*Modern penology regards crime and criminal as equally material when the right sentence has to be picked out. It turns the focus not only on the crime, but also on the criminal and seeks to personalise the punishment so that the reformist component is as much operative as the deterrent element. It is necessary for this purpose that facts of a social and personal nature, sometimes altogether irrelevant if not injurious, at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined.*

*A proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances — extenuating or aggravating — of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental conditions of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by*

*others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These factors have to be taken into account by the Court in deciding upon the appropriate sentence.*

*The hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the Court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. Of course, care would have to be taken by the Court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings.”*

*17. It will thus be seen that there is a great discretion vested in the Judge, especially when pluralistic factors enter his calculations. Even so, the Judge must exercise this discretionary power, drawing his inspiration from the humanitarian spirit of the law, and living down the traditional precedents which have winked at the personality of the crime-doer and been swept away by the features of the crime. What is dated has to be discarded. What is current has to be incorporated. Therefore innovation, in all conscience, is in the field of judicial discretion.*

*18. Unfortunately, the Indian Penal Code still lingers in the somewhat compartmentalised system of punishment viz. imprisonment, simple or rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfil his tryst with curing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing Judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be.*

*19. Sentencing justice is a facet of social justice, even as redemption of a crime-doer is an aspect of restoration of a whole personality. Till the new Code recognised statutorily that punishment required considerations beyond the nature of the crime and circumstances surrounding the crime and provided a second stage for bringing in such additional materials, the Indian Courts had, by and large, assigned an obsolescent backseat to the sophisticated judgment on sentencing. Now this judicial skill has to come of age.”*

10. It was submitted that having regard to all the conspectus of facts, particularly the age of the respondent, his family circumstances, the fact that he had no previous record of convictions, or involvement in any other crime, and that he co-operated with the prosecution at all stages, and never ran away or tried to escape, etc. It was argued that if prison sentence is aimed at reformation, the enhancement of sentence, in this case may not achieve any purpose,

and may, on the contrary result in ruination of the respondent, who had served his sentence, after the Trial Court delivered its judgment. It was also submitted that the Court should exercise appellate jurisdiction having regard to all the circumstances, and interfere with sentencing choice of Trial Courts only if the impugned judgement shocks the court's conscience, and not otherwise.

11. The above discussion reveals that the scope of this appeal is narrow; it extends to considering whether the sentence imposed by the Trial Court is "inadequate". Before dealing with that, it would be essential to consider the respondent's argument, impeaching the finding of guilt, recorded against him, in respect of the attempt to commit rape. The respondent correctly argues that the medical evidence did not establish rape, or the ingredients of the offence he was convicted of. The court is also conscious of the fact that the conviction is based solely on the testimony of a child witness, who could not describe the facts accurately; she had to be prompted to do so, by the APP, who was permitted to cross-examine her. Yet, those cannot be circumstances prompting the court to acquit the respondent. The court is conscious that though the prosecutrix is a child witness, she is the victim; she could not have (nor was shown to have) any reason for lying. Furthermore, in attempt to commit rape, a fairly place common argument appears to be that the offender did not commit any act, amounting to attempt, but at best had done something which was preparatory to the commission of the offence. Any debate on this aspect, at least in respect of the offence of attempted rape, has been foreclosed by the binding judgment of the Supreme Court in *Madan Lal v. State of J&K*, (1997) 7 SCC 677, where it was held that:

*"12. The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her lie flat on the ground undresses himself and then forcibly rubs his erected penis on the private parts of the girl but fails to penetrate the same into the vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with Section 511 IPC. In the facts and circumstances of the present case the offence of an attempt to commit rape by the accused has been clearly established and the High Court rightly convicted him under Section 376 read with Section 511 IPC."*

In view of the above discussion, the facts as found, and the ruling of the Supreme Court, the court does not find any reason to disturb the conviction of the respondent.

12. Penology and sentencing in our country has remained an underdeveloped concept. In several jurisdictions across the world, sentencing choices are guided not only by the subjective “facts of the case” but a whole variety of factors, such as social investigation of the offender, his family background, his social environment, behaviour, tendencies, etc. These are apart from the more “traditional” factors such as the history of previous offences or convictions, subjective facts pertaining to the offender, such as age, gender, gravity of the offence, circumstances leading to the offence, etc. More often than not, these are factored into a set of codified rules or regulations, which in some cases, prescribe great details, and even mandate separate hearings, where the judge is obliged to consider evidence presented in that regard. Sadly, courts in this country do not have the benefit of such specialized assistance. As a result, courts have to fall back on judicially evolved standards and *ad-hoc* notions of penology and theories while exercising discretion in relation to offences where sentencing choices span a wide spectrum of penalties and prison terms. Here, the courts have to strike a balance between the need to impose an “adequate” sentence even while keeping in mind that the choice has to ultimately sub serve a larger public purpose, and not be one merely given for the ritualistic satisfaction of notions like public justice. An offender found to have committed a crime has to suffer conviction, and also a punishment. However, if sentencing choices are dominated by notions like popular justice or popularity demanded sentences or punishments, it is ultimately the cause of justice, and rule of law which suffers. A French philosopher and mystic (Simone Weil (1909-43), in her *"Draft for a Statement of Human Obligations"*) said that:

*“Whenever a human being, through the commission of a crime, has become exiled from good, he needs to be reintegrated with it through suffering. The suffering should be inflicted with the aim of bringing the soul to recognize freely some day that its infliction was just.”*

13. While considering the sentence, it would be apt to notice the judgment reported as *State of A.P. v. Bodem Sundara Rao*, (1995) 6 SCC 230. The court upheld the conviction of the respondent, for the offence of rape, and held that the minimum sentence was 10 years. The courts below had imposed RI for 4 years; it was enhanced to seven years. The court held that:

*“We, thus, consider it our plain duty to enhance the sentence in this case. Keeping in view the facts and circumstances of this case and the submissions made by the learned amicus curiae, while maintaining the conviction of the respondent for the offence under Section 376, Indian Penal Code, we enhance the sentence of 4 years’ RI to 7 years’ RI, which is the minimum prescribed sentence under the section, for we find no adequate or special reasons to impose a*

*sentence less than the prescribed minimum. Necessary warrants shall be issued to take the respondent into custody to undergo the remaining period of sentence.”*

In *State of M.P. v. Bablu Natt*, (2009) 2 SCC 272, the Supreme Court upheld the sentence of four years imprisonment for rape of a minor, when the lower courts had exercised jurisdiction under proviso to Section 376 (1). The court held that:

*“The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with. Socio-economic status, religion, race, caste or creed of the accused and the victim although may not be wholly irrelevant, should be eschewed in a case of this nature, particularly when Parliament itself had laid down minimum sentence. In India, we do not have sentencing guidelines. Necessity of the guidelines on the judicial side has been highlighted in *State of Punjab v. Prem Sagar*<sup>1</sup> wherein it was noticed: (SCC p. 553, paras 5-8)*

*“5. Whether the court while awarding a sentence would take recourse to the principle of deterrence or reform or invoke the doctrine of proportionality would no doubt depend upon the facts and circumstances of each case. While doing so, however, the nature of the offence said to have been committed by the accused plays an important role. The offences which affect public health must be dealt with severely. For the <sup>277</sup> said purpose, the courts must notice the object for enacting Article 47 of the Constitution of India.*

*6. There are certain offences which touch our social fabric. We must remind ourselves that even while introducing the doctrine of plea bargaining in the Code of Criminal Procedure, certain types of offences had been kept out of the purview thereof. While imposing sentences, the said principles should be borne in mind.*

*7. A sentence is a judgment on conviction of a crime. It is resorted to after a person is convicted of the offence. It is the ultimate goal of any justice-delivery system. Parliament, however, in providing for a hearing on sentence, as would appear from sub-section (2) of Section 235, sub-section (2) of Section 248, Section 325 as also Sections 360 and 361 of the Code of Criminal Procedure, has laid down certain principles. The said provisions lay down the principle that the court in awarding the sentence must take into consideration a large number of relevant factors; sociological backdrop of the accused being one of them.*

*8. Although a wide discretion has been conferred upon the court, the same must be exercised judiciously. It would depend upon the circumstances in which the crime has been committed and his mental state. Age of the accused is also relevant.”*

14. In a previous ruling, the Supreme Court had held that there cannot be any cast iron rule about what constituted relevant factors while exercising jurisdiction for “special” reasons, in imposing a sentence which was less than the minimum prescribed in the case of rape. This was in *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 where it was held that:

*“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’ RI though in exceptional cases “for*

*special and adequate reasons” sentence of less than 10 years’ RI 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.”*

15. In this case, the offence for which the respondent was convicted was attempted rape, though he was charged for the offence of rape. The circumstances also show that the prosecutrix, a minor was unable to depose about the incident; the prosecution cross examined her to elicit details of the facts. The respondent and prosecutrix were both medically examined; nothing was discerned. The respondent co-operated with the prosecution in the investigation. All these were taken into consideration by the Trial Court. It also considered the offender’s age, as well as his previous (lack of) record. The materials also did not suggest his propensity to commit crimes. The accused respondent was an under trial prisoner for the entire duration of the proceedings before the Trial Court. He continued to be incarcerated after the impugned judgment was delivered, and having completed his sentence, was set free. The State does not dispute that the factors cited by the Trial Court when it chose to impose the sentence that it did, actually existed. The court has regard to all these circumstances, and the further fact that this Court would exercise and interfere with sentencing discretion of the Trial Court in a given case where the “inadequacy” of sentence is gross or glaring, or shocks the court’s conscience, and also recollects the decisions of the Supreme Court noticed in the preceding parts of this judgment, where the sentence in the case of rape was enhanced from four to seven years, though the minimum prescribed in the category of rape was imprisonment for ten years. The court considers that the impugned judgment and order on sentence, in the given facts and conspectus of circumstances, does not warrant interference.

16. For the above reasons, the appeal has to fail, and is accordingly dismissed.

**(S.RAVINDRA BHAT)**  
**JUDGE**

May 20, 2011

**(G.P. MITTAL)**  
**JUDGE**