

\$~33&34

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

%

Judgment reserved on 30.03.2016
Judgment pronounced on 08.04.2016

+ **CRL.A. 227/2016**

THE STATE GOVT OF NCT OF DELHI ... Appellant
Through: Ms. Aashaa Tiwari, APP for State.
Versus

TANJEER ALAM @ RAJA ... Respondent
Through : Mr. Javed Ahmed and Mr. Mohd.
Ovais, Advocates.

+ **CRL. A. 56/2016**

TANJEER ALAM @ RAJAAppellant
Through : Mr. Javed Ahmed and Mr. Mohd.
Ovais, Advocates.
Versus

THE STATE ...Respondent
Through: Ms. Aashaa Tiwari, APP for State.

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J.

Crl. M. A. No. 3828/2016 (Delay) in Crl. A. No. 227/2016

1. This is an application under Section 5 of the Limitation Act read with Section 482 of the Code of Criminal Procedure filed by the State seeking condonation of delay of 22 days in filing the present appeal.
2. Having regard to the submissions made and in the interest of justice the delay in filing the present appeal is condoned.
3. Application stands disposed of.

Crl. A. Nos. 56/2016 and 227/2016

4. Appeal No. 56/2016 has been filed by Tanjeer Alam @ Raja for setting aside the judgment on conviction dated 18.11.2015 and order on sentence dated 20.11.2015. The State has filed Appeal No. 227/2016 with the prayer that the sentence awarded to the accused be enhanced.
5. Present appeals arise out of a common judgment dated 18.11.2015 and order on sentence dated 20.11.2015 passed by the learned Additional Sessions Judge, Delhi in Session's Case No. 01/2012 whereby the accused had been sentenced to undergo rigorous imprisonment for a period of three years and a fine of Rs. 5,000/- for the offence punishable under Section 376 of the Indian Penal Code and in default of payment of fine, the accused shall undergo simple imprisonment for further one month. The accused was further sentenced to undergo rigorous imprisonment for a period of three years for the offence punishable under Section 366 of the Indian Penal Code and was also directed to pay a fine of Rs. 5000/- for the said offence, in default of which the accused shall undergo simple imprisonment for further one month. The accused was also sentenced to undergo rigorous imprisonment for a period of one year for the offence punishable under Section 363 of the Indian Penal Code and was also directed to pay a fine of Rs. 1000/- for the said offence, failing which he shall undergo simple imprisonment for further two weeks. All the sentences were ordered to run concurrently. Both the appeals have been heard together and are disposed of by a common judgment.

6. Brief facts of the case, as noted by the learned Trial Court are as under:

“On 01.05.2011 at about 08.00pm, she was going to the Rehari of her father at Seelampur; in the mid way, the accused who was on a motorcycle, met her and made her sit on the motorcycle despite her resistance. Before that he offered the victim a laddoo which she ate in good faith but after eating it she started feeling giddiness and lost her senses but not consciousness. She further stated that when she regained her senses and consciousness, she found herself to be at Amritsar as told by the accused. It was also told by the accused to her that he had brought her there. They stayed at the house of one of the relatives of the accused but when the said relative suspected the victim then on the next day, the accused brought her back to Delhi at Kailash Nagar at the house of his brother, where he committed rape upon her against her wishes. There, again the brother and sister in law of the accused had some suspicion and accordingly they left the victim at the house of her father. She also alleged that the accused had extended threats to kill, at Kailash Nagar as well as Amritsar.”

7. In order to substantiate its case, prosecution has examined as many as 14 witnesses. The statement of the accused was recorded under Section 313 of the Code of Criminal Procedure wherein he denied all the charges and claimed his innocence. The accused examined one witness in his defence i.e DW1 Mohd. Idris who was the real brother of the accused.
8. Ms. Aashaa Tiwari, learned Additional Public Prosecutor for the State in Appeal No. 227/2016 submits that the Trial Court has committed a grave error in imposing a sentence of imprisonment of only three

years which is less than the minimum punishment prescribed for the offence punishable under Sections 376 of the Indian Penal Code.

9. Ms. Tiwari further submits that the impugned order on sentence dated 20.11.2015 is erroneous and not admissible in law and therefore cannot be sustained in the eyes of law
10. Learned Additional Public Prosecutor for the State further submits that the Trial Court erred in not appreciating the fact that at the time of the commission of offence the age of the prosecutrix was only about 15 years and thus she could not be a consenting party and the Trial Court ought to have awarded atleast the minimum punishment provided under Section 376 of the Indian Penal Code. To substantiate her arguments, learned counsel for the State relied upon the decision of the Hon'ble Supreme Court in the case of ***State of Rajasthan v. Vinod Kumar*** reported in **2012 (6) SCR 1**, wherein it has been held that :

"20. That punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment. The court has to decide the punishment after considering all the aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused and age of the sexually assaulted victim and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case. The power under the proviso is not be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation. The legislature introduced the imposition

of minimum sentence by amendment in the IPC w.e.f. 25.12.1983, therefore, the courts are bound to bear in mind the effect thereof.

The court while exercising the discretion in the exception clause has to record "exceptional reasons" for resorting to the proviso. Recording of such reasons is sine qua non for granting the extraordinary relief. What is adequate and special would depend upon several factors and no straight jacket formula can be laid down."

11. Per contra, Mr. Javed Ahmed counsel appearing on behalf of the accused in Crl. A. No. 56/2016 submits that the judgment of the trial court is liable to be set aside as there are material contradictions in the statement of the prosecutrix. In her statement under Section 164 of the Code of Criminal Procedure she has not alleged the commission of rape and at a belated stage made improvements in the deposition before the court.
12. Learned counsel further submits that the prosecutrix went with the accused at her own sweet will as she was in love with him and wanted to marry him and this fact stands established by the love letters and photographs and as such conviction under Section 376 of the Indian Penal Code is not made out.
13. We have heard learned counsel for both the parties and considered their rival submissions. We have also gone through the record of the Trial Court and the testimonies of the witnesses.
14. Before delving into the merits of the case it is necessary to go through the testimony of the prosecutrix.
15. PW2 the prosecutrix in her statement under Section 164 of the Code of Criminal procedure deposed that her father stalled a 'Rehari' near the

police station Seelampur; that on 01.05.2011 at about 8:00 p.m., when she was going to meet her father, accused Raja @ Tanjeer Alam, who resided in her gali, met her near the police station Seelampur and asked her if he should drop her to her father on his bike. Initially she refused but on being insisted she sat on his bike and accused offered her a 'Ladoo' which she ate. PW2 further deposed that she was unable to understand what was going on and by the time she became normal she found herself in Amritsar and stayed in the house of the cousin of the accused. She contacted her parents on the phone. They went to Amritsar by bus and returned to Kailash Nagar, Delhi by train on the next day. PW2 further deposed that they stayed in the house of brother of the accused in Delhi and on the next day brother and bhabhi of the accused dropped her to her parents.

16. PW2 prosecutrix in her examination in chief deposed as under :

“On 01.05.2011, I had left my house at about 8:00 pm to meet my father, near P.S. Seelampur, Delhi, where my father used to stall ‘Rehri’. But, I could not reach there as accused Tanjeer Alam @ Raja, present in court (correctly identified), met me at Pulia, near DCP office, Seelampur, Delhi. Accused came on bike and asked me to sit thereon but I refused. But, accused forced me to sit on bike with the promise that he will leave me to my father. On this assurance I sat on bike. In the meantime, accused offered me a “Laddu” which I ate. When I felt giddiness, I asked him to stop the bike but he did not stop the bike. Thereafter, I became unconscious. When I regained my consciousness I found myself in a bus in Amritsar, Punjab. Accused took me at the house of his cousin (son of his mausi), where he introduced me that he had love marriage with me. We had stayed there for one day and on the following day i.e. 3rd, May 2011 accused forcibly

brought me to Kailash Nagar, Delhi at the house of his brother. I had requested him to drop me at my house but accused did not do so and took me to the house of his brother and threatened me that I had been defamed and stopped me from moving towards my house. In Kailash Nagar, Delhi brother and sister-in-law of accused were present there and accused introduced me with them as he had introduced me in Amritsar, Punjab.

During stay at the house of brother of accused, in Kailash Nagar, accused committed rape upon me without my consent. Brother and sister-in-law of accused kept me in a room with accused and put 'Kundi' at the door from outside as told me by accused. On next day, brother and sister-in-law of accused took me to my house at Welcome, Delhi and left me with my parents. "

17. PW14 Dr. Priyadarshani Nanda who examined the prosecutrix deposed as under:

"On 05.05.2011, I was posted with GTB Hospital as S.R. and on that day I had examined the victim in this case who was brought by W/Ct. Sanju. The alleged history was disclosed by the victim herself that she eloped with a boy namely Raja, aged 22 years on 01.05.2011 at 09:00am and came back to Delhi on 03.05.2011. As per the given history by the victim, she was forced into sexual contact on 03.05.2011 at Kailash Nagar in Raja's brother's residence namely Mansoor. The patient was giving history of forceful vaginal penetration but no associated physical assault. No history of any signs of struggle or injuries. The victim had changed her clothes and had passed urine.

During internal examination on inspection, I had found external genitalia healthy with no sign of injuries but there was bleeding present. The patient was menstruating at the time of her examination. Hymen was ruptured and suggestive of fresh rupture/tear.

After examination, I was of the opinion that there was evidence of vaginal penetration with fresh hymenal tears and introitus admitting one finger and was not suggestive of habitual contact."

18. In the case of ***State of Himachal Pradesh vs Asha Ram*** reported in ***AIR 2006 SC 381***, the Apex Court observed as under:

"5....It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

19. In ***Vijay @ Chinee v. State of Madhya Pradesh*** reported in ***[2010] 8 SCR 1150***, the Apex Court held as under:

"Evidence of the witnesses must be read as a whole and the cases are to be considered in totality of the circumstances and while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, should not be taken into consideration as they cannot form grounds to reject the evidence as a whole."

20. It is a well settled law that conviction can be based on the sole testimony of the prosecutrix if the same inspires confidence. Plethora of decisions would show that once the statement of the prosecutrix inspires confidence and is accepted by the Court, the conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration would be required. It is also well established proposition

of law that minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for not accepting an otherwise reliable prosecution case. In view of the above, we are of the considered opinion that the contradictions pointed out by the counsel on behalf of the accused are minor in nature and do not render the evidence unbelievable. Furthermore, the testimony of the prosecutrix is duly corroborated with the medical evidence on record.

21. Another contention of learned counsel for the accused is that the prosecutrix accompanied the accused at her own sweet will. In this regard, it would be relevant to mention the observation of the Hon'ble Supreme Court in the case of *Satish Kumar Jayantilal Dabgar vs State of Gujarat* reported in (2015) 7 SCC 359, wherein it has been held that if the prosecutrix is less than 16 years of age, consent for sexual intercourse is immaterial and inconsequential. Clause sixth of Section 375 of Indian Penal Code would get attracted making her consent for sexual intercourse as immaterial and inconsequential. In para 14 to 16 the Hon'ble Supreme Court has observed and held as under:

"14. First thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section 375 of the Indian Penal Code would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows:

'Section 375 Rape-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--

xxxxxx

Sixthly - With or without her consent, when she is under sixteen years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. '

15. The Legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.

16. Once we put the things in right perspective in the manner stated above, we have to treat it a case where the appellant has committed rape of a minor girl which is regarded as heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when

we keep in mind the letter and spirit behind Protection of Children from Sexual Offences Act."

22. Keeping in view the above, the plea raised by Mr. Javed Ahmed, learned counsel for the appellant in Appeal No. 56/2016 does not hold ground as undoubtedly the age of the prosecutrix at the time of alleged incident was about 15 years and her consent, if any is immaterial and inconsequential.
23. Having discussed the aforesaid, now it is worthwhile to examine the quantum of punishment awarded by the Trial Court for the offence punishable under Sections 376 of the Indian Penal Code.
24. Before considering the submission on the aspect of quantum of sentence under Section 376 of the Indian Penal Code, it would be relevant to peruse the same which reads as under:

“Section - 376 Sub section (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years...”

25. In ***Rajendra Prasad v. State of Uttar Pradesh***, reported in ***1979 CriLJ 792***, wherein the Hon'ble Supreme Court observed that :

“Judges are entitled to hold their own views, but it is the bounden duty of the Court to impose a proper punishment, depending upon the degree of criminality and the desirability to impose such punishment as a measure of social necessity, as a means of deterring other potential offenders.”

26. In *State of Madhya Pradesh v. Bala @ Balaram* reported in 2005 (3) ACR 3156 (SC), the Apex Court observed as under :

"11. The crime here is rape. It is a particularly heinous crime, a crime against society, a crime against human dignity, one that reduces a man to an animal. The penal statute has prescribed a maximum and a minimum punishment for an offence under Section 376 I.P.C. To view such an offence once it is proved, lightly, is itself an affront to society. Though the award of maximum punishment may depend on the circumstances of the case, the award of the minimum punishment, generally, is imperative. The provisos to Section 376(1) and 376(2) I.P.C. give the power to the court to award a sentence lesser than the minimum for adequate and special reasons. The power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases where special facts and circumstances justify a reduction. The reasons must be relevant to the exercise of such discretion vested in the court. The reasons must be set out clearly and cogently. The mere existence of a discretion by itself does not justify its exercise. The long pendency of the criminal trial or the offer of the rapist to marry the victim are not relevant reasons. Nor is the age of the offender by itself an adequate reason.

xxxxxxx

13. The rationale for advocating the award of a punishment commensurate with the gravity of the offence and its impact on society, is to ensure that a civilized society does not revert to the days of 'an eye for an eye and a tooth for a tooth'. Not awarding a just punishment

might provoke the victim or its relatives to retaliate in kind and that is what exactly is sought to be prevented by the criminal justice system we have adopted.

14. *Even in the time of Kautilya, the need for awarding just punishment was recognized. According to Kautilya, "whoever imposes severe punishment becomes repulsive to people, while he who awards mild punishment becomes contemptible. The ruler just with the rod is honoured. When deserved punishment is given, it endows the subjects with spiritual good, material well being and pleasures of the senses." (See Kautilyan Jurisprudence by V.K. Gupta under the head 'Nature and Scope of punishment'). This philosophy is woven into our statute and our jurisprudence and it is the duty of those who administer the law to bear this in mind."*

27. In ***State of Madhya Pradesh v. Munna Choubey and Anr.***, reported in (2005) ***Cri.LJ 913***, the Apex Court observed as under:

"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 meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counterproductive 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."

xxxxxx

17. *It is true that reformation as a theory of punishment is in fashion but under the guise of applying such theory, courts cannot forget their duty to society and to the*

victim. The Court has to consider the plight of the victim in a case involving rape and the social stigma that may follow the victim to the grave and which in most cases, practically ruins all prospects of a normal life for the victim. Could a Court afford to forget these aspects while imposing a punishment on the aggressor? I think not. The Court has to do justice to the society and to the victim on the one hand and to the offender on the other. The proper balance must be taken to have been struck by the legislature. Hence, the legislative wisdom reflected by the statute has to be respected by the Court and the permitted departure therefrom made only for compelling and convincing reasons."

28. In the case of **Sumer Singh v. Surajbhan Singh and others** reported in (2014)7 SCC 323, the Hon'ble Supreme Court emphasized the need for appropriate punishment and observed as under:

"...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 IPC 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."

29. In the case of ***Shimbhu and another v. State of Haryana*** reported in (2014) 13 SCC 318, the Apex Court has observed 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.

xxxxxx

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.”

30. Rape is a heinous crime not only against the individual but also against the society at large. The offences against the woman more particularly under Section 376 of the Indian Penal Code are increasing. Therefore, if such an offence is committed it has to be dealt with strictly and no leniency should be shown. The punishment prescribed by the Indian Penal Code reflects the gravity of the concerned offence and its impact on the society. It is necessary for the courts to imbibe the legislative wisdom and to respect it. The legislature in its wisdom made a provision for awarding a sentence of less than seven years when there are special and adequate reasons for the same. The power under the proviso is not to be used arbitrarily or routinely. It is to be used sparingly and only in cases where special facts and circumstances justify a reduction. In the present case at the time of commission of offence prosecutrix was less than 16 years of age and the punishment prescribed in the law is minimum 7 years of rigorous imprisonment which can be reduced only if there exist some special and adequate reasons for the same.
31. In the above backdrop, considering the age of the prosecutrix at the time of the occurrence of the offence and the facts narrated above, in

our view, it is not a fit case where sentence less than the minimum should be awarded.

32. In view of the above, we allow the Crl. A. No. 227/2016 preferred by the State and enhance the sentence to rigorous imprisonment for a period of 7 years under Section 376 of the Indian Penal Code and the fine remains unaltered. The respondent shall surrender within three weeks from today to undergo the remaining sentence.
 33. Additionally, so far as the conviction of the accused under Section 363 and 366 of the Indian Penal Code is concerned, we are in consonance with the view taken by the Trial Court and find no reasons to interfere with the order of sentence awarded to the accused.
 34. Resultantly, the Crl. A. No. 56/2016 filed by the accused stands dismissed.
 35. Trial Court Record be returned.
 36. Copy of this order be sent to Superintendent of Jail for their records.
- Crl.M. (B) No. 107/2016 in Crl. A. No. 56/2016**
37. In view of the order passed in the appeal, the present application becomes infructuous.
 38. Application is dismissed.

G. S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

APRIL 8, 2016

gr//