

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Amk

CRIMINAL APPEAL NO. 569 OF 2001

The State of Maharashtra]
Mangaon Police Station,]
Dist. Raigad] .. Appellant

Vs.

Shri Santosh Vasant Salunkhe]
Age-21 years, Res.-Indapur,]
Tal.-Mangaon, Dist.-Raigad.] .. Respondent

Mrs. A. S. Pai, APP for the Appellant-State.

Mr. Rahul Thakur a/w. Mr. Sanket Thakur, Ms. Sushmita Tandel for the Respondent.

**CORAM : PRADEEP NANDRAJOG, C.J. &
SMT. BHARATI DANGRE, J.**
DATE : 13th AUGUST, 2019.

ORAL JUDGMENT (*Per Pradeep Nandrajog, C.J.*)

1. The State is aggrieved on account of fact that in spite of convicted for the offence punishable under Section 376 read with Section 511 of the Indian Penal Code i.e. attempt to rape, the Respondent has been let off on probation by extending the benefit under Section 4 of the Probation of Offenders Act, 1958 read with Section 360 Cr.P.C.
2. The reason why the learned trial Judge has given said benefit of probation is the age of the Respondent when the crime was committed. As per the evidence on record his age was 21 years when the crime took place.

3. FIR was registered on 17.04.1999 when the prosecutrix (PW-1) came with her mother and relatives to the police station and made a statement. The statement records that on 15.04.1999, as the prosecutrix was returning from the house of her grandmother to the house where she lived with her parents, at 8.00 p.m. the Respondent who was driving an auto rikshaw offered a lift to her and her sister Roshani (PW-2). He took them to a lonely place and attempted to rape her.

4. The MLC : Ex 34, of the prosecutrix shows no injury on the body much less around the genitals. The hymen was found intact. The opinion rules out the possibility of any forcible sexual intercourse and relevant would it be to highlight that when the crime was statedly committed, the definition of rape under Section 375 I.P.C. had not been amended by the Criminal Law (Amendment) Act, 2013.

5. The Respondent has not preferred any Appeal against his conviction. As noted above, the State is aggrieved by the sentence imposed and not qua the offence for which the Respondent has been held guilty of.

6. Where the provisions of the Probation Act are applicable the employment of Section 360 of the Code is not to be made. In cases of such application, it would be an illegality resulting in highly undesirable consequences, which the legislature, who gave birth to the Probation Act and the Code wanted to obviate. Yet the legislature in its wisdom has obliged the Court under Section 361 of the Code to apply one of the other beneficial provisions; be it Section 360 of the Code or the provisions of the Probation Act. It is only by providing special reasons that their applicability can be withheld by the Court. The comparative

elevation of the provisions of the Probation Act are further noticed in Sub-section (10) of Section 360 of the Code which makes it clear that nothing in the said Section shall affect the provisions of the Probation Act. Those provisions have a paramouncy of their own in the respective areas where they are applicable.

7. Section 360 of the Code relates to persons above 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less and to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the Probation Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for Probation Officers in assisting the Courts in relation to supervision and other matters while Probation Act does make such a provision. While Section 12 of the Probation Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the Probation Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain parallel provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anomalous results. The intention to retain the provisions of Section 360 of the Code and the provisions of the Probation Act as applicable at the same time in a given area cannot be gathered from the provisions of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses

Act, where the provisions of the Act have been brought into force, the provisions of Section 360 of the Code are wholly inapplicable.

8. Every accused person need not be detained, arrested and imprisoned-Liberty is precious and must not be curtailed unless there are good reasons to do so. Similarly, everybody convicted of a heinous offence need not be hanged however shrill the cry "off with his head"- and this cry is now being heard quite frequently. Life is more precious than liberty and must not be taken unless all other options are foreclosed. Just sentencing is as much an aspect of justice as a fair trial and every sentencing judge would do well to ask: Is the sentence being awarded fair and just?

9. In the decision reported as (1981)1 SCC 447 Ved Prakash v. State of Haryana the Court observed:

".....It is the duty of the sentencing Court to be activist enough to collect such facts as have a bearing on punishment with a rehabilitation slant.

A little later in the judgment, it was held that:

".....Even if the Bar does not help, the Bench must fulfil the humanizing mission of sentencing implicit in such enactments as the Probation of Offenders Act."

10. In other words, this Court was of the view that punishment should be rehabilitative and humanizing and, therefore, need not necessarily be retributive in character.

11. Subsequently, in the decision reported as (1988) 4 SCC 551 Hari Singh v. Sukhbir Singh the Court held that extending the benefit of

probation to first time offenders is generally not inappropriate. The humanizing principle was extended even to a conviction under Part II of Section 304 of the Indian Penal Code in the decision reported as (1999) 5 SCC 732 State of Karnataka v. Muddappa in which case the benefit of release on probation was granted to the convict.

12. The benefit of the provisions of Section 4 of the Probation of Offenders Act (relating to restrictions on the imprisonment of offenders below 21 years of age) was extended to persons convicted of attempt to rape in the decision reported as (1997) 7 SCC 756 State of Haryana v. Prem Chand which was followed in the decision reported as (2004) 9 SCC 681 State of Himachal Pradesh v. Dharam Pal, where again the accused was held guilty of the offence of attempt to rape.

13. Similarly, in the decision reported as (2001) 10 SCC 477 Om Prakash v. State of Haryana the convicts, first time offenders, were given the benefit of Section 360 and Section 361 of the Code of Criminal Procedure and it was held that reasons ought to have been recorded for the denial of such a benefit. The offence in this case was punishable under Section 323 and Section 325 read with Section 148 and Section 149 of the Indian Penal Code.

14. In the decision reported as (2013) 10 SCC 31 Ajagar Ali v. State of West Bengal the Appellant was convicted of an offence of outraging the modesty of a woman punishable under Section 354 of the Indian Penal Code. This was held to be "a heinous crime and with the social condition prevailing in the society, the modesty of a woman has to be strongly guarded" and so the benefit of the Probation of Offenders Act

was not given to him. This may be contrasted with Prem Chand and subsequently Dharam Pal where the convict was guilty of a far more serious offence of attempt to rape and yet granted the benefit of the Probation of Offenders Act, notwithstanding the nature of the crime, and only because of his age.

15. These decisions indicate that the philosophical basis of our criminal jurisprudence is undergoing a shift-from punishment being a humanizing mission to punishment being deterrent and retributive. This shift may be necessary in today's social context (though no opinion is expressed), but given the legislative mandate of Sections 360 and 361 of the Code of Criminal Procedure and the Probation of Offenders Act, what is imperative for the judge is to strike a fine balance between releasing a convict after admonition or on probation or putting such a convict in jail. This can be decided only on a case by case basis but the principle of rehabilitation and the humanizing mission must not be forgotten.

16. There are other legislative requirements that need to be kept in mind. The Probation of Offenders Act provides, in Section 5 thereof for payment of compensation to the victim of a crime (as does Section 357 of the Code of Criminal Procedure). Yet, additional changes were brought about in the Code of Criminal Procedure in 2006 providing for a victim compensation scheme and for additional rights to the victim of a crime, including the right to file an appeal against the grant of inadequate compensation. How often have the Courts used these provisions?

17. In the decision reported as (2013) 6 SCC 770 Ankush Shivaji Gaikwad v. State of Maharashtra and in the decision reported as (2013) 11 SCC 193 Jitendra Singh v. State of U. P. the Court held that consideration of grant of compensation to the victim of a crime is mandatory, in the following words taken from Ankush Shivaji Gaikwad:

"While the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation."

18. This being the position in law, there is a necessity of giving justice to the victims of a crime and by arriving at a fair balance, awarding a just sentence to the convicts by treating them in a manner that tends to assist in their rehabilitation. The amendments brought about in the Code of Criminal Procedure in 2006 also include a chapter on plea bargaining, which again is intended to assist and enable the Trial Judge to arrive at a mutually satisfactory disposition of a criminal case by actively engaging the victim of a crime. It is the duty of a Trial Judge to utilize all these tools given by Parliament for ensuring a fair and just termination of a criminal case.

19. In the decision reported as AIR 2000 SC 1470 State of Karnataka v/s Krishnappa, a three- Judge Bench, while discussing about the purpose of imposition of adequate sentence, opined that protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence and the

sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.

20. In the decision reported as (2010) 12 SCC 532 Jameel v. State of Uttar Pradesh, the trial court had convicted the appellant therein under Section 308 IPC along with another and punished them with two years rigorous imprisonment. In appeal, the conviction and sentence of the appellant were affirmed. By the time the matter came to be considered by Court, the Court observed as under: -

"In operating the sentencing system, law should adopt the corrective machinery or 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. It is 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. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

21. In the decision reported as (2013) 7 SCC 77 Shyam Narain v/s State (NCT of Delhi), it has been ruled that primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of

imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes, for it serves as a deterrent. The Court observed, true it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. It has been further opined that while carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

22. In the decision reported as (2012) 8 SCC 734 Guru Basavaraj v. State of Karnata, the Court, discussing about the sentencing policy, had to say this: -

"There can hardly be any cavil that there has to be a proportion between the crime and the punishment. It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice which includes adequate punishment cannot be lightly ignored."

23. In the decision reported as (2012) 4 SC 516 Rattiram v. State of M. P. though in a different context, it has stated that: -

"the criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception

of a trial from the viewpoint of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries.... it is the duty of the court to see that the victim's right is protected."

24. It is seemly to state here that though the question of sentence is a matter of discretion, vague and unregulated benevolence. It is to be exercised a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in social life.

25. In the decision reported as *AIR 1981 SC 2085 Ramji Dayawala & Sons (P.) Ltd. v. Invest Import* : -

"when it is said that a matter is within the discretion of the court it is to be exercised according to well established judicial principles, according to reason and fair play, and not according to whim and caprice. 'Discretion', said Lord Mansfield in R.v. Wilkes, ((1770) 98 ER 327), 'when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular' (see Craies on Statute Law, 6th Edn., p.273)."

26. For the reasons noted hereinabove, we dismiss the Appeal.

[SMT. BHARATI DANGRE, J.]

[CHIEF JUSTICE]