

**IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH**

249

CRR-805-2021 (O&M)

Date of Decision: 14.07.2022

KANTI @ LUCKY

... Petitioner

Versus

STATE OF HARYANA

... Respondent

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. Viren Sibal, Advocate (Legal Aid Counsel)
for the petitioner.

Mr. Kanwar Sanjiv Kumar, Asstt. A.G. Haryana.

VINOD S. BHARDWAJ, J. (ORAL)

The present writ petition has been filed through Legal Aid Counsel against the judgment dated 05.02.2021 passed by the Additional Sessions Judge, Panipat in Criminal Appeal No.149 of 2020 titled as 'Kanti Vs. State of Haryana, arising out of judgment of conviction dated 14.02.2017 and order on sentence dated 23.05.2017 passed by the Chief Judicial Magistrate, Panipat in criminal case No.CHI-560 of 2015 titled as 'State Vs. Kanti and another' arising out of FIR No.225 dated 28.02.2015 under Section 379 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') registered at Police Station City Panipat.

The brief facts of the case are that complainant Sonu s/o Kailash moved a complaint Ex PW1/A with regard to the theft of his motorcycle that took place on 26.02.2015 from Bhool Bhuliya Chowk by unknown persons. Rukka was sent and vide DD no. 23 dated 28.02.2015, FIR No.225 dated 28.02.2015 under Section 379 IPC at PS City, Panipat has been registered.

During the course of investigation, site plan of place of occurrence was prepared as Ex PW3/A, necessary gazette notification through CIA was got issued by virtue of Ex PW3/B. Accused Kanti and Pankaj were got arrested in FIR No. 236 dated 12.03.2015 under Section 379 IPC at PS City, Panipat in

which they allegedly suffered disclosure statements as Ex.PW2/A and Ex.PW2/B respectively. In view of their disclosure statements, the accused persons were arrested in the present FIR by ASI Suresh Kumar, CIA-I, Panipat in presence of whom they again suffered alleged disclosure statements as Ex.PW5/A and Ex.FW5/B. In pursuance of their alleged disclosure statements, motorcycle was got recovered vide memo of recovery as Ex.PW5/C, while site plan of place of recovery was prepared as Ex.PW5/D and memo of demarcation at the behest of the accused persons was prepared as Ex.PW5/E. It would be worthwhile to mention that the stolen property was later on taken on superdari by the complainant Sonu on furnishing superdaginama as Ex.PW1/B from the Court vide order dated 19.03.2015. After completion of formal investigation, challan was filed.

On the completion of the investigation, a report under section 173 of Code of Criminal Procedure (hereinafter referred to as 'CrPC') was presented in the Court. Copies of the Challan supplied to the accused, free of cost, as required under Section 207 of Cr.PC. On the basis of report under Section 173 Cr.PC and accompanying documents, a prima facie case punishable under Section 379 IPC and in alternate Section 411 IPC was made out against the petitioner-accused. Accordingly, the petitioner-accused was charge-sheeted to which the accused pleaded not guilty and claimed trial.

Thereafter, the prosecution got examined the following witnesses:

PW1	Sonu	Complainant
PW2	EHC Rambir	Police witness
PW3	ASI Ram Niwas	Police witness
PW4	ASI Shyam Lal	Police witness
PW5	SI Suresh Kumar	Police witness

PW6	ASI Tasvir Singh	Police witness
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During the evidence, the prosecution produced and proved the following documents:

Sr. No.	Exhibit	Nature of Document	Name of witnesses who testified documents.
1.	Ex.PW1/A	Complaint	Sonu
2.	Ex.PW2/A	Disclosure statement of accused Kanti	EHC Rambir
3.	Ex.PW2/B	Disclosure statement of accused Pankaj	EHC Rambir
4.	Ex.PW3/A	Rough site plan of place of occurrence	EHC Rambir
5.	Ex.PW3/B	Application dated 28.02.2015	ASI Ram Niwas
6.	Ex.PW4/A	FIR	ASI Shyam Lal
7.	Ex.PW4/B	Endorsement about FIR	ASI Shyam Lal
8.	Ex.PW5/A	Disclosure statement of accused Pankau	ASI Suresh Kumar
9.	Ex.PW5/B	Disclosure statement of accused Kanti	ASI Suresh Kumar
10.	Ex.PW5/C	Recovery memo	ASI Suresh Kumar
11.	Ex.PW5/D	Rough site plan of place of recovery of motorcycle	ASI Suresh Kumar
12.	Ex.PW5/E	Memo of demarcation	ASI Suresh Kumar

The entire incriminating material was put to the petitioner-accused in the statement under Section 313 of the Cr.P.C., to which he had pleaded his innocence and false implication. No evidence in defence was, however, led by the petitioner despite availing effective opportunity. Upon consideration of the respective arguments and the evidence adduced by the prosecution, the Chief Judicial Magistrate, Panipat held as under:

“16. A strong objection was taken by the Id. Defence counsel that non joining of private witness at the time of alleged disclosure statement as well as alleged recovery apparently throws the case of the prosecution. Rather shows that the

present case was implanted on the accused person.

17. However, the court does concur with the argument so raised for not relying upon credibility of the official witnesses. In the case of Parmod Kumar v. State (GNCT) of Delhi AIR 2013 SC 3344, it was held that the witness from the department of police cannot per se be said to be untruthful or unreliable. It would depend upon the veracity, credibility and unimpeachability of their testimony. There is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trust worthy, the court can definitely act upon the same. If, in the course of scrutinizing the evidence, the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle that quality of the evidence weighs over the quantity of evidence.

18 Applying the said law on the facts of the cases the quality of testimonies of both ASI. Suresh and ASI. Tasvir Singh inspire confidence before the court to come to the conclusion that in pursuance of the alleged disclosure statements suffered by them, the recoveries were effected which could not be explained by the accused person even at the time of the trial. No defence was taken or evidence led to show that the accused person were falsely implanted with the present case.

19. It would be worthwhile to mention that it has been amply proved by the prosecution that the case property ie. the motorcycle was later on recovered from the accused on 15.03.2015 by virtue of his alleged disclosure statement as Ex.

PW5/A and Ex PW5/B and memo of recovery and identification.

20. *Now, here the question arises with regard to the fact that where the FIR was registered against the unknown person under Section 379 IPC, can the accused who is facing the trial be convicted with the commission of offence under Section 379 IPC from whom the alleged recovery was effected?*

21. *The aid for the same may be taken of Section 114 (a) Evidence Act, thereby speaking that the court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. Presumption of recent possession is an optional presumption. But if the explanation of accused invokes doubt in the mind of the Court, presumption cannot operate to convict the accused as held in the case of **Karnal Singh versus State of Maharashtra, AIR 1976 SC 1097.***

22. **XXXXXXXXXX**

23. *At this foremost, no explanation has come forward from the mouth of the accused in the shape of suggestion given at the time of cross examination of the prosecution witnesses nor when the incriminating evidence was put to the accused under Section 313 Cr.P.C. so much so no defence was taken by him with regard to the case of the prosecution or the fact as to how they were in the possession of the same.*

24. *So far as attending circumstances are concerned, the motorcycle was allegedly recovered from the accused from their rented accommodation. The motorcycle was duly taken on superdari by the real owner Sonu s/o Kailash thereby establishing the ownership of the complainant Sonu s/o Kailash of the said property.*

25. *It would further be pertinent to mention that the accused person were found with the stolen motorcycle within*

one month from the date of theft and they failed to establish any cogent reason for its possession, presumption may be drawn. Considering the factum that such possession was exclusive and conscious possession of the accused only.

26. In such scenario, despite the fact that the FIR was registered against an unknown person, the factum that the motorcycle which was produced before the court and recovered at the behest of the accused in the presence of official witness, on 15.03.2015 within one month period from the date of commission of offence proves the case of the prosecution that the accused Kanti and Pankaj indeed committed the offence under Section 379 IPC.

27. Since the offence against the accused persons under section 379 IPC stands proved, which not only showed the theft but with the attending circumstances, it is proved that the property was recovered from them only, the question of the retention or receipt of the stolen property does not arise to come under the four corner of section 411 IPC. Both the provisions attract similar penalty of imprisonment of three years or fine or both, the court deems fit to convict the accused for the commission of offence under section 379 IPC.”

The petitioner-accused was accordingly convicted and vide order dated 23.05.2017 was sentenced to undergo rigorous imprisonment for a period of two years for commission of offence punishable under Section 379 of the IPC.

Aggrieved of the same, an appeal was preferred by the petitioner-accused before the Additional Sessions Judge, Panipat. Upon consideration of the rival submissions made by the respective parties, the said appeal was dismissed by the lower appellate Court vide judgment dated 05.02.2021 by observing as under:

“15. Applying the ratio of law laid down by Hon'ble Supreme Court to the facts and circumstances of the case it is held that testimony of the prosecution witnesses who are police officials inspire confidence. No oblique motive has been attributed to any of the prosecution witnesses to falsely implicate accused-appellant in the present case. From the consistent testimony of the prosecution witnesses, the offence against the accused is clearly proved.

16. So far question of commission of offence punishable u/s 379) IPC or 411 IPC is concerned, in this regard, it is pertinent to mention that recovery of stolen property has been effected from the possession of accused-appellant and as such presumption u/s 114 (a) Indian Evidence Act arises that either the accused have committed theft or are receiver of the stolen property. In this regard reliance can be placed on authority titled Karnail Singh Vs. State of Maharashtra AIR 1976 (SC) 1097.

17. From the attending circumstances, it transpires that recovery of the stolen property was effected from possession within one month of the alleged theft. The accused-appellant has failed to account for his possession. It is also, nowhere, the case of the accused-appellant that they had purchased the stolen property from the third person. Thus, only plausible presumption that arises is that appellant-accused committed theft of stolen property.”

Hence, present Revision Petition has been preferred.

During the course of the argument, learned counsel for the petitioner-accused was confronted with the observations so recorded by the Courts below and was called upon to point out any illegality or infirmity in the judgments so passed by the Courts below concurrently. Considering the above, learned counsel for the petitioner-accused gave up the challenge to the judgment of conviction and restricted his prayer to the quantum of sentence

only. It was pointed out by the learned counsel for the petitioner that the sentence awarded is for a period of two years and that the petitioner-accused has already undergone an actual custody of 01 year, 07 months and 07 days and further prayed that the sentence awarded may be reduced to the period already undergone by the petitioner-accused. It was pointed out that the petitioner was 21 years of age as on the date of his conviction and has old parents to take care of. It is further argued that the petitioner has already undergone substantive part of the sentence awarded to him.

Per contra, learned State counsel vehemently submits that the petitioner does not deserve any concession and that in the absence of any convincing the mitigating circumstances, there is no justifiable ground for reducing the sentence awarded by the trial Court that was further affirmed by the lower appellate Court.

I have heard the rival submissions advanced by the counsel for respective parties and have also gone through the record of the case meticulously.

Parameters and Principles of Sentencing:

8. The Hon'ble Supreme Court has laid down certain principles to govern the Courts in the matter of sentencing. Reference in this regard is made to the judgment of the Hon'ble Supreme Court in the matter of **State of Punjab Vs. Prem Sagar & Ors (2008) 7 SCC 550**, the relevant extract of the said judgment is reproduced hereinbelow:-

'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 circumstance of each case.

5. 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 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. The 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.

9. What would be the effect of the sentencing on the society is a question which has been left unanswered by the legislature. The Superior Courts have come across a large number of cases which go to show anomalies as regards the policy of sentencing. Whereas the quantum of

punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine.

10. In Dhananjoy Chatterjee Alias Dhana v. State of W.B. [(1994) 2 SCC 220], this Court held:

"15...Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime..."

11. Gentela Vijayavardhan Rao and Another v. State of A.P. [(1996) 6 SCC 241], following Dhananjoy Chatterjee (supra), states the principles of deterrence and retribution but the same cannot be categorized as right or wrong. So much depends upon the belief of the judges.

12. In a recent decision in Shailesh Jasvantbhai and Another v. State of Gujarat and Others [(2006) 2 SCC 359], this Court opined:

"7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by

imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: "State of criminal law continues to be--as it should be--a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or 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.

Relying upon the decision of this Court in Sevaka Perumal v. State of T.N. [(1991) 3 SCC 471], this Court furthermore held that it was the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.

18. Don M. Gottfredson in his essay on "Sentencing Guidelines" in "Sentencing: Hyman Gross and Andrew von Hirsch" opines:

"It is a common claim in the literature of criminal justice- and indeed in the popular press- that there is considerable "disparity" in sentencing.. The word "disparity" has become a prerogative and the concept of "sentencing disparity" now carries with it the connotation of biased or insidious practices on the part

of the judges. This is unfortunate in that much otherwise valid criticism has failed to separate justified variation from the unjustified variation referred to as disparity. The phrase "unwarranted disparity" may be preferred; not all sentencing variation should be considered unwarranted or disparate. Much of it properly reflects varying degrees of seriousness in the offense and/or varying characteristics of the offender. Dispositional variation that is based upon permissible, rationally relevant and understandably distinctive characteristics of the offender and of the offense may be wholly justified, beneficial and proper, so long as the variable qualities are carefully monitored or consistency and desirability over time. Moreover, since no two offenses or offenders are identical, the labeling of variation as disparity necessarily involves a value judgment- that is, disparity to one person may be simply justified variation to another. It is only when such variation takes the form of differing sentences for similar offenders committing similar offenses that it can be considered disparate."

[Emphasis supplied]

The learned author further opines:

"In many jurisdictions, judicial discretion is nearly unlimited as to whether or not to incarcerate an individual; and bound only by statutory maxima, leaving a broad range of discretion, as to the length of sentence."

19. Kevin R. Reitz in Encyclopedia of Crime and Justice, Second edition "Sentencing guidelines" states:

"All guideline jurisdictions have found it necessary to create rules that identify the factual issues at

sentencing that must be resolved under the guidelines, those that are potentially relevant to a sentencing decision, and those viewed as forbidden considerations that may not be taken into account by sentencing courts. One heated controversy, addressed differently across jurisdictions, is whether the guideline sentence should be based exclusively on crimes for which offenders have been convicted ("conviction offenses"), or whether a guideline sentence should also reflect additional alleged criminal conduct for which formal convictions have not been obtained ("nonconviction offenses").

Another difficult issue of fact-finding at sentence for guideline designers has been the degree to which trial judges should be permitted to consider the personal characteristics of offenders as mitigating factors when imposing sentence. For example: Is the defendant a single parent with young children at home? Is the defendant a drug addict but a good candidate for drug treatment? Has the defendant struggled to overcome conditions of economic, social or educational deprivation prior to the offense? Was the defendant's criminal behavior explicable in part by youth, inexperience, or an unformed ability to resist peer pressure? Most guideline states, once again including all jurisdictions with voluntary guidelines, allow trial courts latitude to sentence outside of the guideline ranges based on the judge's assessment of such offender characteristics. Some states, fearing that race or class disparities might be exacerbated by unguided consideration of such factors, have placed limits on the list of eligible concerns. (However, such factors may indirectly affect the sentence, since judges are

permitted to base departures on the offenders particular "amenability" to probation (Frase, 1997).)"

20. Andrew von Hirsch and Nils Jareborg have divided the process of determining sentence into stages of determining proportionality while determining a sentence, namely:

1. What interest are violated or threatened by the standard case of the crime- physical integrity, material support and amenity, freedom from humiliation, privacy and autonomy.

2. Effect of violating those interests on the living standards of a typical victim- minimum well-being, adequate well-being, significant enhancement

3. Culpability of the offender

4. Remoteness of the actual harm as seen by a reasonable man.'

9. The said issue was also examined by the Hon'ble Supreme Court in the matter of **Soman Vs. State of Kerala, (2013) 11 SCC 382**, the relevant extract of the said judgment is reproduced hereinbelow:-

'15. Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges. In State of Punjab v. Prem Sagar (2008) 7 SCC 550, this Court acknowledged as much and observed as under –

“2. In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard

to the purport and object for which punishment is imposed upon an offender, have not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines.”

16. Nonetheless, if one goes through the decisions of this Court carefully, it would appear that this Court takes into account a combination of different factors while exercising discretion in sentencing, that is proportionality, deterrence, rehabilitation etc. (See: Ramashraya Chakravarti v. State of Madhya Pradesh (1976) 1 SCC 281, Dhananjoy Chatterjee alias Dhana v. State of W.B. (1994) 2 SCC 220, State of Madhya Pradesh v. Ghanshyam Singh (2003) 8 SCC 13, State of Karnataka v. Puttaraja (2004) 1 SCC 475, Union of India v. Kuldeep Singh (2004) 2 SCC 590, Shailesh Jasvantbhai and another v. State of Gujarat and others (2006) 2 SCC 359, Siddarama and others v. State of Karnataka (2006) 10 SCC 673, State of Madhya Pradesh v. Babulal (2008) 1 SCC 234, Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498)

14. In a proportionality analysis, it is necessary to assess the seriousness of an offence in order to determine the commensurate punishment for the offender. The seriousness of an offence depends, apart from other things, also upon its harmfulness. The question is whether the consequences of the offence can be taken as the measure for determining its harmfulness? In addition, quite apart from the seriousness of the offence, can the consequences of an offence be a legitimate aggravating (as opposed to mitigating) factor while awarding a sentence. Thus, to understand the relevance of

consequences of criminal conduct from a Sentencing standpoint, one must examine: (1) whether such consequences enhanced the harmfulness of the offence; and (2) whether they are an aggravating factor that need to be taken into account by the courts while deciding on the sentence.

26. Punishment should acknowledge the sanctity of human life. We fully agree.

27. From the above, one may conclude that:

27.1. Courts ought to base sentencing decisions on various different rationales – most prominent amongst which would be proportionality and deterrence.

27.2. The question of consequences of criminal action can be relevant from both a proportionality and deterrence standpoint.

27.3. Insofar as proportionality is concerned, the sentence must be commensurate with the seriousness or gravity of the offence.

27.4. One of the factors relevant for judging seriousness of the offence is the consequences resulting from it.

27.5. Unintended consequences/harm may still be properly attributed to the offender if they were reasonably foreseeable. In case of illicit and underground manufacture of liquor, the chances of toxicity are so high that not only its manufacturer but the distributor and the retail vendor would know its likely risks to the consumer. Hence, even though any harm to the consumer might not be directly intended, some aggravated culpability must attach if the consumer suffers some grievous hurt or dies as result of consuming the spurious liquor.

CONCLUSION

From the perusal of record, it is evident that the incident in question pertains to the year 2015 and the petitioner-accused was about 19 years of age at the time of commission of offence. Besides, he has already undergone an actual period of 01 year, 07 months and 07 days out of total sentence of two years that was awarded to him. The aforesaid circumstances would constitute sufficient grounds for the Court to examine the case of the petitioner-accused for reduction of sentence awarded to him.

In view of the above, present Revision Petition is partly allowed while the judgments of conviction passed by the Courts below are upheld. The order of sentence dated 23.05.2017 is modified and the sentence of rigorous imprisonment of two years awarded to the petitioner-accused vide order dated 23.05.2017 and further affirmed by the lower appellate Court vide judgment dated 05.02.2021 is reduced to the period already undergone by the petitioner.

The Revision Petition is partly allowed in the terms as aforesaid.

(VINOD S. BHARDWAJ)
JUDGE

14.07.2022

rajender

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No