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STATE OF M.P.

v.

BABLU NATT

(Criminal Appeal No. 2060 of 2008)

DECEMBER 18, 2008

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[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Penal Code, 1860:

s.376, proviso – Applicability of – Minor girl compelled C *by accused to live with him for several days and subjected to rape – Conviction u/s.376 – Trial court imposing the minimum prescribed sentence of 7 years – High Court reducing the sentence to period already undergone – Propriety of – Held: On facts, not proper – Power conferred on Court to impose* D *sentence less than the minimum prescribed must not only be supported by reasons but adequate and special reasons ought to be mentioned therefor – High Court did not do so – Sentence awarded by trial Court restored – Sentence/ Sentencing.*

E **According to the prosecution, Respondent took away a minor girl from lawful custody of her father without his consent; compelled her to live with him for several days and during this period committed illicit sexual intercourse with her on more than one occasion** F **against her will and without her consent. Respondent in his defence *inter alia* raised a plea that the prosecutrix was a major and in support thereof produced an affidavit.**

The trial court held the respondent guilty under ss.366 and 376 IPC and sentenced him to undergo 7 G **years of rigorous imprisonment for each offence. On appeal, High Court upheld the conviction of respondent but reduced the quantum of sentence to the period already undergone by him.**

The judgment of the High Court so far as it related

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to the quantum of sentence in terms of s.376 IPC was primarily challenged in the present appeal. Consequently a question arose as regards the applicability of proviso to s.376 IPC in the facts and circumstances of the case. A

Allowing the appeal, the Court

HELD:1. 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. [Para 13] [1104-B-C] B C

State of Punjab vs. Prem Sagar & Others. (2008) 7 SCC 550, referred to. D

2. One of the principles that the judiciary had all along kept in its mind that rape being a violation with the private person of a woman causes mental scar, thus, not only a physical injury but a deep sense of some deathless shame is also inflicted. [Para 14] [1105-E] E

Mohan Anna Chavan vs. State of Maharashtra (2008) 9 SCALE 474 and *Bantu vs. The State of U.P.* (2008) 10 SCALE 336, relied on.

3.1. In the present case, the prosecutrix and the respondent were unknown to each other and came to know each other only on the incident night. A finding of fact had been arrived at that the prosecutrix was minor. The fact that the prosecutrix was subjected to sexual intercourse was supported by medical examination. Medical opinion was rendered that rape was committed on her and she was not habituated to sexual intercourse. On medical examination, the age of the prosecutrix was assessed between 11 and 13 years. [Para 10] [1102-F-H] F G

3.2. The offence with which respondent was charged had been proved to have been committed. Besides, Respondent also got an affidavit affirmed by the H

A **prosecutrix showing her age to be 18 years, which was found to be false. He, therefore, knew the intricacies of law. [Para 12] [1104-A]**

4. The imposition of minimum sentence having been brought about by an amendment in the statute, the court B **should always bear in mind the effect thereof. The power conferred on the court to impose a sentence less than the minimum prescribed must not only be supported by any reason but adequate and special reasons ought to be mentioned therefor. The High Court did not do so. It** C **is difficult to comprehend as to on what materials the High Court opined that 'she was a sensible girl having age of 15 years, she did not complain to anybody and lived for several days with respondent at Chhatarpur'. The fact that the prosecutrix was a minor and subjected to rape and furthermore as according to her, she was** D **compelled to live for several days with the respondent as he would not listen to her plea of taking her to her father was lost sight of by the High Court. The affidavit affirmed by her was found to have been obtained without her knowing the contents thereof and at the instance of** E **respondent. The very fact that she was made to state that her age was 18 years and she was living with the respondent as a wife clearly goes to show the mental trauma which she was undergoing. Therefore, the contents of the said affidavit were wrongly used for** F **imposing a sentence less than minimum prescribed sentence considering the same to be mitigating factor. It was a case where the minimum sentence, to say the least, could be imposed. [Paras 18 and 19] [1108-E-F; 1109-F-H; 1110-A-C]**

G *State of M.P. vs. Bala alias Balaram* **(2005) 8 SCC 1 and** *State of U.P. vs. Bodem Sundara Rao* **(1995) 6 SCC 230, relied on.**

State of Karnataka vs. Raju **(2007) 11 SCC 490 and** *State of Punjab vs. Gurmit Singh & Ors.* **(1996) 2 SCC 384, referred to.**

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5. The judgment awarded by the trial court is restored. It is directed that the respondent be taken in custody forthwith to serve out the remaining sentence. [Para 22] [1111-C]

Case Law Reference:

(2008) 7 SCC 550	**referred to**	**Para 13**
(2008) 9 SCALE 474	**relied on**	**Para 14**
(2008) 10 SCALE 336	**relied on**	**Para 14**
(2005) 8 SCC 1	**relied on**	**Para 15**
(2007) 11 SCC 490	**referred to**	**Para 17**
(1995) 6 SCC 230	**relied on**	**Para 18**
(1996) 2 SCC 384	**referred to**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2060 of 2008.

From the Judgment & Order dated 26.10.2004 of the High Court of Judicature of Madhya Pradesh at Jabalpur in Criminal Appeal No. 566 of 2001.

Vibha Datta Makhija for the Appellant.

Anish Kumar Gupta and Shankar Divate for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. On 26.03.2000, Respondent bought paddy husk for a sum of Rs. 500/- from the father of the prosecutrix whereafter they were said to have become acquainted with each other. Respondent and his friend Mohan Bangali, who came with him, at their request were allowed to sleep in the Khalihan. However, in the middle of the night, he took the prosecutrix away with him. On the next day, i.e., on 27.03.2000, a First Information Report (FIR) was lodged by Shaktideen, father of the prosecutrix. The prosecutrix was a minor but a married woman. She was recovered on 27.7.2000. Respondent was arrested on 28.7.2000. Charges for commission of offences punishable under Sections 366 and 376 of the Indian Penal Code ('IPC'

A for short) were framed.

3. Respondent in his defence raised a plea that prosecutrix was a consenting party. He also raised a plea that she was major. In support of the said contention, he produced an affidavit purported to have been affirmed by her stating
B where her age to be 18.

Further contention of the respondent was that he had arranged the second marriage of Shaktideen, the father of the prosecutrix, subject to the condition that Lilawati (prosecutrix) would be married with him and that is why both the families
C were on visiting terms and Lilawati eloped with respondent voluntarily and had undergone a court marriage.

4. The learned Sessions Judge found that he had committed sexual intercourse with the prosecutrix without her consent and against her will. But even if it is accepted that she
D was a consenting party, as she was not more than 13 years of age, such purported consent was of no moment. Accused was found to have committed sexual intercourse with the prosecutrix on more than one occasion against her will and without her consent between 26th and 27th March, 2000 till the date of her
E recovery, i.e, 27.7.2000, and, thus, is guilty of commission of offences punishable under Sections 366 and 376 of IPC.

The learned Sessions Judge, upon considering the materials on record, found that respondent had taken away the prosecutrix from the lawful custody of her lawful guardian
F Shaktideen – her father – without his consent, with the intention that she be forced to illicit sexual intercourse. It was further held that the appellant had knowledge that the prosecutrix was married but even then he took her away with himself and committed sexual intercourse with the prosecutrix against her will and without her consent.
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Upon hearing respondent on the question of sentence, it was held:

"22. It was argued on behalf of accused that this is his first offence therefore he should be pardoned. Argument and request was heard and considered.
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As has been found above that being well aware of the fact that prosecutrix is married and a minor, even then he took away prosecutrix from the lawful keeping of guardianship of her father without the consent of the father for committing illicit sexual intercourse with her and committed sexual intercourse with prosecutrix against her will and without her consent. In such a circumstance, the above-proved act of the accused does not deserve any pardon. But as the accused is a young man of 20 years therefore, accused Bablu Natt is sentenced to undergo 7-7 years of rigorous imprisonment (for each offence) and with a fine of Rs.500/-, 500/- (five hundred) (for each offence) for committing offences punishable under Section 366/376 of IPC. In case of default of payment of fine, accused had to further undergo 2-2 years of rigorous imprisonment for default of payment of each amount of fine."

5. An appeal was preferred thereagainst. The High Court, by reason of the impugned judgment, while upholding the judgment of conviction interfered with the quantum of sentence, stating:

"11. Yet there is another facet of the case. True, the prosecutrix was minor and did not attain the age of majority. But it is equally true that she is sensible girl having age of 15 years, she did not complain to anybody and she lived for several days with appellant at Chhatarpur. She also traveled at several places in bus she did not complain to anybody. Not only this, she also sworn an affidavit at District Court, Chhatarpur mentioning her age to be 18 years and stated that she is living with appellant as his wife. The prosecutrix admitted in her testimony that she executed affidavit Ex. D/1. In this view of the matter, looking to the totality of the facts and surrounding circumstances, this is a fit case for interfering in the quantum of punishment. For the reasons assigned hereinabove, the

A view of this Court is that for the ends of justice it would be justifiable to enlarge the appellant for the period he has already undergone. From verifying the record, learned counsel for the respondent has submitted that appellant has undergone a jail sentence of four years and two B months, according to me, this would be sufficient punishment for him."

6. The State is, thus, before us.

7. Mr. Vibha Datta Makhija, learned counsel appearing on behalf of appellant submitted that rigorous imprisonment for C seven years having been prescribed by the Parliament, the reasons assigned for sentencing the respondent for the period undergone should not be upheld.

8. Mr. Anish Kumar Gupta, learned counsel appearing on behalf of respondent, however, supported the judgment of the D High Court contending that the reasons assigned by the High Court are not only sufficient but also cogent for the purpose of invoking the proviso appended to Section 376 of the IPC.

9. Indisputably, sentence in terms of Section 366 of the I.P.C. may extend to rigorous imprisonment for a term of ten E years or fine or with both. Section 376 thereof provides for sentence 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. The proviso appended thereto, however, provides that 'the court may, for adequate and F special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years'.

10. Was it a case where the proviso to Section 376 could be invoked is the question. The prosecutrix and the respondent were unknown to each other. They came to know each other G only on the night of 26.3.2000. A finding of fact had been arrived at that she was minor. The fact that she was subjected to sexual intercourse was supported by the medical evidence. Medical opinion was rendered that rape was committed on her and she was not habituated to sexual intercourse. On medical examination, her age was assessed between 11 and 13 years. H

11. We may place on record a few questions put to the said witness and answers thereof:

"Question: What happened to you?

Answer: When I asked the accused to take me to my house then he started talking nonsense and started telling me.

Question: What nonsense he started talking with you and what he started telling you?

Answer: Accused asked me to sleep with him and I refused, the accused made me sleep with him by use of force and took off my Saari and also took off my clothes and humiliated me and did bad act with me. (One sentence omitted).

I could not even go to my parents house because the accused was keeping me in his house

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Everyone in my house call me Bitti. It is wrong to say that I went with accused Bablu on my own volition. It is wrong to say that I married with accused Bablu in the Chattarupur Court by my own will. It is wrong to say that an affidavit was signed in this respect. It is correct that such paperwork was completed in the Court and accused told me to tell my age to be 18 years therefore, I told my age to be 18 years. It is wrong to say that I completed such paperwork. When I was caught in the house of the accused, I was kept there by the accused for 6 days. I do not know that whose house is located besides the house of accused Bablu. When witness was shown affidavit of Exhibit D-4, witness says that photograph pasted on it from A to A belongs to her.

It is wrong to say that Bablu did not elope me. It is wrong to say that I came to his house on my own will."

A 12. Admittedly, an offence with which respondent was charged had been proved to have been committed. He also got an affidavit affirmed by the prosecutrix showing her age to be 18 years, which was found to be false. He, therefore, knew the intricacies of law.

B 13. 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 C 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 vs. Prem Sagar & Others.*[(2008) 7 SCC 550], wherein it was noticed:

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"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 E 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.

F 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 G 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 H 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."

Upon noticing the development of law in this behalf in other countries, it was opined:

"31. We have noticed the development of law in this behalf in other countries only to emphasise that the courts while imposing sentence must take into consideration the principles applicable thereto. It requires application of mind. The purpose of imposition of sentence must also be kept in mind."

14. One of the principles that the judiciary had all along kept in its mind that rape being a violation with violence of the private person of a woman causes mental scar, thus, not only a physical injury but a deep sense of some deathless shame is also inflicted. (See *Mohan Anna Chavan vs. State of Maharashtra* [2008 (9) SCALE 474] and *Bantu vs. The State of U.P.* [2008 (10) SCALE 336]

Although, with utmost respect to the Hon'ble Judges, one may not entirely agree with invocation of doctrine of proportionality in imposing death sentence as has been highlighted in the above two cases, we may notice that in latter doctrine of proportionality has been invoked, stating:

"24. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit

A sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the B correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and C widespread."

15. We may also notice that in *State of M.P. vs. Bala alias Balaram* [(2005) 8 SCC 1], this Court commenting upon the grossly inadequate sentence imposed upon by the High Court of Madhya Pradesh, stated:

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"6. Sub-section (1) of Section 376 I.P.C. provides that 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 7 years but which may be for life or for a term which may E extend to 10 years and shall also be liable to fine. In the category of cases covered under Sub-section (2) of Section 376, the sentence cannot be less than 10 years but which may be for life and shall also be liable to fine. The proviso appended to Sub-section (1) lays down that F 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 7 years. There is a similar proviso to Sub-section (2) which empowers the Court to award a sentence of less than 10 years for G adequate and special reasons to be mentioned in the judgment. The High Court in the impugned order has awarded a sentence which is not only grossly inadequate but is also contrary to express provision of law. The High Court has not assigned any satisfactory reason much less adequate and special reasons for reducing the sentence

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to a term which is far below the prescribed minimum. Therefore, the sentence awarded by the High Court is clearly illegal." A

P.K. Balasubramanyan, J. in his concurring judgment added:

"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. B C D E

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." F G

16. The said line of reasonings was adopted in about twelve short orders following the said decision. H

17. In *State of Karnataka vs. Raju* [(2007) 11 SCC 490], it was held:

> "6. It needs no emphasis that the physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery.
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> 7. It is to be noted that in Sub-section (2) of Section 376 I.P.C. more stringent punishment can be awarded taking into account the special features indicated in the said sub-section. The present case is covered by Section 376(2)(f) IPC i.e. when rape is committed on a woman when she is under 12 years of age."

18. We have noticed hereinbefore that the age of the prosecutrix was assessed between 11 and 13 years, but by way of abundant precaution, the learned Sessions Judge held her age to be less than 13. The court has not, therefore, awarded any punishment in terms of Section 376(2)(f) of the Indian Penal Code. But even in doing so, the learned trial judge herein imposed the minimum sentence, should have met the approval of the High Court. It was a case where the minimum sentence, to say the least, could be imposed. While saying so, we may notice that this Court in *State of U.P. vs. Bodem Sundara Rao* [(1995) 6 SCC 230] stated the law thus:

> "6. After its amendment, Section 376(1) provides for a minimum sentence of seven years which may extend to life or for a term which may extend to 10 years besides fine for the offence of rape. The proviso to Sub-Section (1) lays that the Court may for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than seven years.
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> 7. Keeping in view the nature of the offence and the helpless condition in which the prosecutrix a young girl of

13/14 years was placed, the High Court was clearly in error in reducing the sentence imposed upon the respondent and that too without assigning any reasons, much less special and adequate reasons. The High Court appears to have overlooked the mandate of the Legislature as reflected in Section 376(1) IPC.

9. In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act."

19. The imposition of minimum sentence having been brought about by an amendment in the statute, the court should always bear in mind the effect thereof. The power conferred on the court to impose a sentence less than the minimum prescribed must not only be supported by any reason but adequate and special reasons ought to be mentioned therefor. The High Court did not do so. It is difficult to comprehend as to on what materials the High Court opined that 'she was a sensible girl having age of 15 years, she did not complain to anybody and lived for several days with respondent at

A Chhatarpur'. The fact that she was a minor and subjected to rape and furthermore, as noticed hereinbefore, according to her, she was compelled to live for several days with the respondent at Chhatarpur as he would not listen to her plea of taking her to her father was lost sight of by the High Court. The B affidavit affirmed by her was found to have been obtained without her knowing the contents thereof and at the instance of respondent. The very fact that she was made to state that her age was 18 years and she was living with the respondent as a wife clearly goes to show the mental trauma which she was undergoing. We are, therefore, of the opinion that the contents C of the said affidavit were wrongly used for imposing a sentence less than minimum prescribed sentence considering the same to be mitigating factor.

20. Our attention, however, has been drawn to the decision of this Court in *State of Punjab vs. Gurmit Singh & Ors.* [(1996) D 2 SCC 384], wherein this Court imposed less sentence than the minimum prescribed one. In that case, a judgment of acquittal was passed. This Court reversed the said judgment. It was in the aforementioned situation, balance was sought to be struck, stating:

E "...In this case the occurrence took place on 30.3.1984 (more than 11 years ago. The respondents were aged between 21-24 years of age at the time when the offence was committed. We are informed that the respondents have not been involved in any other offence after they were F acquitted by the trial court on 1.6.85, more than a decade ago. All the respondents as well as prosecutrix must have by now got married and settled down in life. These are some of the factors which we need to take into consideration while imposing an appropriate sentence on G the respondents. We accordingly sentence the respondents for the offence Under Section 376 IPC to undergo five years' RI each and to pay a fine of Rs. 5000 each and in default of payment of fine to 1 year's RI each. For the offence Under Section 363 IPC we sentence them to undergo three years R.I. each but impose no separate H

sentence for the offence Under Section 366/368 IPC. The substantive sentences of imprisonment shall, however, run concurrently." A

21. The decision does not lay down any legal principle. It does not create a binding precedent. We have noticed that the same learned judge has spoken in different voice in *Bodem Sundara Rao* (supra). B

22. For the reasons aforementioned, the judgment of the High Court is set aside so far as it relates to the quantum of sentence and the judgment awarded by the trial court is restored. It is directed that the respondent be taken in custody forthwith to serve out the remaining sentence. The appeal is allowed to the aforementioned extent. C

B.B.B. Appeal allowed.