State Of H.P vs Nirmala Devi on 10 April, 2017

Equivalent citations: AIR 2017 SUPREME COURT 1981, (2017) 2 JLJR 212 (2017) 6 MH LJ (CRI) 356, (2017) 6 MH LJ (CRI) 356

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Bench: Ashok Bhushan, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2017
[Arising out of SLP (Crl.) No. 8983 of 2012]

STATE OF HIMACHAL PRADESH	.....APPELLANT(S)	
VERSUS		
NIRMALA DEVI	.....RESPONDENT(S)	

J U D G M E N T

A.K. SIKRI, J.

Leave granted.

Respondent herein faced trial for offence covered by Sections 328, 392, 397 read with Section 34 of the Indian Penal Code (IPC) alongwith co-accused Krishan Lal Sharma. When the trial was underway, both the accused persons were released on bail, pending trial. 12 prosecution witnesses (PWs) were examined and some more were yet to be examined. At that stage, respondent absented from court and was declared a proclaimed offender. Thereafter, trial proceeded against Krishan Lal Sharma, who was convicted for committing offences under the aforesaid provisions, for which he was charged, vide judgment dated 19th April, 2002. Later on, the respondent was apprehended and brought to trial and testimony of remaining prosecution witnesses were recorded in her case. It culminated in the judgment dated 27th February, 2003 whereby the Sessions Judge convicted the respondent also for the offences punishable under Sections 328, 307, 392 read with Section 34, IPC. As a consequence, order of sentence was passed on 5th March, 2003. She was inflicted with the punishments of simple imprisonment for a period of two years and fine in the sum of Rs. 2,000/-, in default of payment of which to undergo imprisonment for a further period of three months, for the offence each punishable under Sections 328, 307 and 392 IPC with direction that all the substantive sentences were to run concurrently.

Fine of Rs. 6,000/- was directed to be paid to the complainant, Ramesh Kumar as compensation. A sum of Rs. 12,000/- was recovered from the respondent which was also ordered to be released to the complainant.

The respondent filed an appeal against the judgment dated 5th March, 2003 passed by the Sessions Judge in the High Court. The High Court has affirmed the conviction. However, insofar as award of sentence is concerned, it is drastically modified by removing imprisonment part of the sentence and substituting the same with fine simplicitor of Rs. 30,000/-. Concluding paragraph of the impugned judgment giving reasons for taking this course of action is reproduced below:

> "I have given careful consideration to the submission made by the learned counsel appearing for the appellant, who submits that the appellant is a lady and looking after her three minor sons out of them two are mentally unsound and in these circumstances, the Court should take a lenient view. This fact was also urged before the learned trial court which has taken a lenient view of the case. What I find further is that the appellant has also absconded during the trial and cannot be considered to be such an innocent person. However, on the conspectus of the material on record, it would be in the fitness of things in the case the sentence of imprisonment under each head is set aside and instead a fine of Rs. 30,0/- is imposed upon the appellant with a direction that the amount be deposited in the Court of learned Sessions Judge, Chamba, Division Chamba within a period of six months from today failing which the sentence of imprisonment shall revive. On deposit of such fine, it shall be paid to the complainant. A direction is issued to the learned Sessions Judge, Chamba to comply with this judgment." Respondent has not challenged the order against that part of the judgment whereby her conviction has been upheld by the High Court. To that extent, the judgment of the High Court has attained finality. On the contrary, it is the State which has filed the Special Leave Petition under Article 136 of the Constitution (out of which present appeal arises), questioning the validity, propriety and justification of the impugned order whereby the sentence of imprisonment is set aside and substituted by fine of Rs. 30,000/-. Therefore, the learned counsel for the parties confined their submissions on this aspect alone.
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> Before examining the issue raised, it would be apposite to take note of the prosecution case against the respondent for which she stands convicted. The case originated on the basis of complaint filed by the complainant, Ramesh Kumar (PW-13), resulting into registration of the FIR (Exh. PL). He stated therein that on 22nd August, 2000, he left his house situated at Preet Nagar, Jammu at around 8.40 A.M. in the morning to withdraw a sum of Rs. 27,000/- from his Bank account from the Bank Satbari for the purposes of purchasing an auto-tempo which he wanted to use for transporting children studying in his school. On way to the bank, he met Krishan Lal accused, who was driving Maruti Van No. JK-02M-4392, an old acquaintance of the complainant. He asked the complainant as to where he was going whereupon he disclosed that he was going to withdraw a sum of Rs. 27,000/- for purchasing an auto-tempo from Pathankot. At that point of time, the complainant

had a sum of Rs. 4,000/- in his pocket. Accused Krishan Lal told him that he would get him a discount from an authorized auto-tempo dealer at Pathankot and that he was willing to drive him to that place. Both went to the bank where the complainant withdrew a sum of Rs. 27,000/-. Thereafter, accused Krishan Lal took him to his house where he was offered a cup of tea. Then, Krishan Lal took him to the house of one lady (respondent herein). He informed the complainant that this lady would also go to Pathankot and they would go there together. The accused offered a glass of water and thereafter a cup of tea after which the complainant, Ramesh Kumar, suspected that he had been made to ingest some intoxicant. They boarded the Van where after the complainant lost consciousness. He regained his senses/consciousness in the Civil Hospital at Dalhousie in the early hours of 24th August, 2000. He had lost all the currency. The case is that the money had been looted from the complainant; he had been beaten up badly and dumped in a Nullah somewhere near Dalhousie. It is on the aforesaid allegations that the respondent along with Krishan Lal were fasten with the charges under Sections 328, 392, 307 read with Section 34 of the IPC. As pointed above, prosecution was able to substantiate the aforesaid allegations resulting into the conviction of the respondent.

To put it in nutshell, the prosecution succeeded in proving, beyond reasonable doubt, that respondent in furtherance of common intention with her co-accused had administered stupefying intoxicating substance to the complainant with intent to commission of offence, that is, theft of currency notes of the complainant and in the process attempted to kill the complainant as well.

At this juncture, I would like to reproduce the provisions under which the respondent has been convicted.

“S. 328: Causing hurt by means of poison, etc. with intent to commit an offence:

Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

S. 392: Punishment for robbery:

Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

S. 307 : Attempt to murder.—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty or murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [imprisonment for life], or to such punishment as is here in before mentioned.

Attempts by life convicts- [When any person offending under this section is under sentence of [imprisonment for life], he may, if hurt is caused, be punished with death.] As is clear from the bare reading of the aforesaid sections, offence mentioned therein are of serious nature. Maximum 'imprisonment' for committing offence under Section 328 IPC is 10 years as well as fine. Likewise, the punishment stipulated in Section 392 IPC is 'rigorous imprisonment' for a term which may extend to 10 years, as well as fine. In case of highway robbery between sunset and sunrise, imprisonment can be extended even to 14 years, though that is not the case here. Insofar as Section 307 IPC is concerned, which relates to commission of offence by attempting to murder, again maximum sentence of imprisonment of either description (i.e. simple or rigorous) upto 10 years can be awarded, in addition to making the convict liable to pay fine. This punishment can go upto life imprisonment if hurt is caused to any person by an act which is done with the intention or knowledge that it may cause death.

In the instant case, hurt is caused. Following aspects are clearly discernible from the reading of these provisions:

The offences mentioned under all these Sections are of serious nature. Maximum penalty, under normal circumstances, is 10 years which under certain circumstances can even be life imprisonment (Section 307 IPC) or 14 years (under Section 392 IPC) Whereas imprisonment under Sections 307 IPC and 328 IPC can be of either description, namely, 'simple imprisonment' or 'rigorous imprisonment' and, therefore, it is left to the discretion of the trial court to award any of these depending upon the circumstances of a case, insofar as punishment under Section 392 IPC is concerned there is no such discretion and the imprisonment has to be rigorous in nature.

In the instant case, as noticed above, trial court awarded imprisonment of two years, that too, simple imprisonment for all the three offences which was to run concurrently. The record shows that it was pleaded before the trial court that respondent is a lady and further that she had three minor sons. These considerations persuaded the trial court to take a lenient view. In the appeal filed by the respondent before the High Court, on the question of sentence same very circumstances were pleaded, which resulted in mellowing the High Court further by setting aside the imprisonment part of sentencing and modifying the sentence to that of fine of Rs. 30,000/- alone.

In this context and factual background, two points arise for consideration, viz.:

Whether the High Court was permitted, in law, to do away with the punishment of imprisonment altogether and substitutes the same with fine alone?

Whether the circumstances pleaded by the respondent were so mitigating that punishment of fine alone could be justified?

Coming to the first question, as can be seen from the language of Sections 307, 328 and 392 of IPC, all these sections provide for imprisonment 'and' fine. In fact, after specifying particular term of imprisonment, all these sections use the words 'and shall also be liable to fine'. This expression came up for consideration in Zunjarrao Bhikaji Nagarkar v. Union of India & Ors.[1] and the Court explained that in such circumstances, it is imperative to impose both the sentences i.e. imprisonment as well as fine. Thus, there has to be punishment of imprisonment in respect of these offences, and in addition, the convict is also liable to pay fine. Therefore, awarding the punishment of imprisonment is a must and there cannot be a situation where no imprisonment is imposed at all. The High Court was, therefore, clearly wrong in not inflicting a sentence of imprisonment, by modifying the sentence awarded by the trial court and obliterating the sentence of imprisonment altogether. Thus, the very approach of the High Court in substituting the sentence by fine alone is impermissible in law.

Section 386 of the Code of Criminal Procedure enlists the powers of the appellate court while hearing the appeals from the trial court. In an appeal from conviction, if the conviction is maintained, the appellate court has the power to alter the nature or the extent, or the nature and extent, of the sentence (though it cannot enhance the same). However, such a power has to be exercised in terms of the provisions of Indian Penal Code etc. for which the accused has been convicted. Power to alter the sentence would not extend to exercising the powers contrary to law. It clearly follows that the High Court committed a legal error in doing away with the sentence of imprisonment altogether.

The second question is as to whether the circumstances pleaded by the respondent justify taking a lenient view in the matter. The acts committed by the respondent constitute heinous offences. Having common intention along with co-accused, she administered poison like substance to the complainant; robbed him of his money; and even attempted to kill him. As already held, award of sentence is imprisonment is a must. The question is, in the wake of the commission of crime of this nature, to what extent the mitigating factor viz. the respondent being a woman and having three minor children, be taken for the purposes of sentencing?

In Zunjarrao Bhikaji Nagarkar's case, it was impressed upon by this Court that the penalty to be imposed has to commensurate with the gravity of the offence. In

Narinder Singh & Ors. v. State of Punjab & Anr.[2], there is a brief narration of the jurisprudential theories of punishment in criminal cases, described as under:

"14. The law prohibits certain acts and/or conduct and treats them as offences. Any person committing those acts is subject to penal consequences which may be of various kinds. Mostly, punishment provided for committing offences is either imprisonment or monetary fine or both. Imprisonment can be rigorous or simple in nature. Why are those persons who commit offences subjected to such penal consequences? There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.

15. Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well, namely, whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation, etc. In the absence of such guidelines in India, the courts go by their own perception about the philosophy behind the prescription of certain specified penal consequences for particular nature of crime. For some deterrence and/or vengeance becomes more important whereas another Judge may be more influenced by rehabilitation or restoration as the goal of sentencing. Sometimes, it would be a combination of both which would weigh in the mind of the court in awarding a particular sentence. However, that may be a question of quantum.

16. What follows from the discussion behind the purpose of sentencing is that if a particular crime is to be treated as crime against the society and/or heinous crime, then the deterrence theory as a rationale for punishing the offender becomes more relevant, to be applied in such cases.

Therefore, in respect of such offences which are treated against the society, it becomes the duty of the State to punish the offender. Thus, even when there is a settlement between the offender and the victim, their will would not prevail as in such cases the matter is in public domain. Society demands that the individual offender should be punished in order to deter other effectively as it amounts to greatest good of the greatest number of persons in a society. It is in this context that we have to understand the scheme/philosophy behind Section 307 of the Code.

17. We would like to expand this principle in some more detail. We find, in practice and in reality, after recording the conviction and while awarding the sentence/punishment the court is generally governed by any or all or combination of the aforesaid factors. Sometimes, it is the deterrence theory which prevails in the minds of the court, particularly in those cases where the crimes committed are

heinous in nature or depict depravity, or lack morality. At times it is to satisfy the element of "emotion" in law and retribution/vengeance becomes the guiding factor. In any case, it cannot be denied that the purpose of punishment by law is deterrence, constrained by considerations of justice. What, then, is the role of mercy, forgiveness and compassion in law? These are by no means comfortable questions and even the answers may not be comforting. There may be certain cases which are too obvious, namely, cases involving heinous crime with element of criminality against the society and not parties inter se. In such cases, the deterrence as purpose of punishment becomes paramount and even if the victim or his relatives have shown the virtue and gentility, agreeing to forgive the culprit, compassion of that private party would not move the court in accepting the same as larger and more important public policy of showing the iron hand of law to the wrongdoers, to reduce the commission of such offences, is more important. Cases of murder, rape, or other sexual offences, etc. would clearly fall in this category. After all, justice requires long-term vision. On the other hand, there may be offences falling in the category where the "correctional" objective of criminal law would have to be given more weightage in contrast with "deterrence" philosophy. Punishment, whatever else may be, must be fair and conducive to good rather than further evil. If in a particular case the court is of the opinion that the settlement between the parties would lead to more good; better relations between them; would prevent further occurrence of such encounters between the parties, it may hold settlement to be on a better pedestal. It is a delicate balance between the two conflicting interests which is to be achieved by the court after examining all these parameters and then deciding as to which course of action it should take in a particular case." The offences for which the respondent is convicted prescribe maximum imprisonment and there is no provision for minimum imprisonment. Thus, there is a wide discretion given to the Court to impose any imprisonment which may be from one day (or even till the rising of the court) to ten years/life. However, at the same time, the judicial discretion which has been conferred upon the Court, has to be exercised in a fair manner keeping in view the well established judicial principles which have been laid down from time to time, the prime consideration being reason and fair play. Some of the judgments highlighting the manner in which discretion has to be exercised were taken note of in Satish Kumar Jayanti Lal Dabgar v. State of Gujarat[3] and I may reproduce the same:

> "18. Likewise, this Court made the following observations regarding sentencing in the cases involved in sexual offences in Sumer Singh v. Surajbhan Singh [(2014) 7 SCC 323 : (2014) 3 SCC (Cri) 184] : (SCC pp. 337-39, paras 33-36) "33. It is seemly to state here that though the question of sentence is a matter of discretion, yet the said discretion cannot be used by a court of law in a fanciful and whimsical manner. Very strong reasons on consideration of the relevant factors have to form the fulcrum for lenient use of the said discretion. It is because the ringing of poignant and inimitable expression, in a way, the warning of Benjamin N. Cardozo in The Nature of the Judicial Process—Yale University Press, 1921 Edn., p. 114:
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> 'The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by

system, and subordinated to "the primordial necessity of order in social life".'

34. In this regard, we may usefully quote a passage from Ramji Dayawala and Sons (P) Ltd. v. Invest Import [(1981) 1 SCC 80] : (SCC p. 96, para 20) "20. ... 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) 4 Burr 2527 :

(1558-1774) All ER Rep 570 : 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).'

35. In Aero Traders (P) Ltd. v. Ravinder Kumar Suri [(2004) 8 SCC 307] the Court observed: (SCC p. 311, para 6) "6. ... According to Black's Law Dictionary "judicial discretion" means the exercise of judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right. The word "discretion" connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate. (See 27 Corpus Juris Secundum, p. 289.) When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice and not according to private opinion; according to law and not humour. It only gives certain latitude or liberty accorded by statute or rules, to a Judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him.' Thus, the Judges are to constantly remind themselves that the use of discretion has to be guided by law, and what is fair under the obtaining circumstances.

36. Having discussed about the discretion, presently we shall advert to the duty of the court in the exercise of power while imposing sentence for an offence. 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 rationalised 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 Code 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 for two years apart from the fine that has been imposed by the learned trial Judge." Likewise, stressing upon the principle of proportionality in sentencing in the case of Hazara Singh v. Raj Kumar & Ors.[4], this Court stressed that special reasons must be assigned for taking lenient view and undue sympathy for accused is not justified. It was equally important to keep in mind rights of victim as well as society at large and the corrective theory on the one hand and deterrence principle on the other hand should be adopted on the basis of factual matrix. Following paragraphs from the said judgment under the caption 'sentencing policy' need to be referred to:

> "11. The cardinal principle of sentencing policy is that the sentence imposed on an offender should reflect the crime he has committed and it should be proportionate to the gravity of the offence. This Court has repeatedly stressed the central role of proportionality in sentencing of offenders in numerous cases.
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> 12. The factual matrix of this case is similar to the facts and circumstances in Shailesh Jasvantbhai v. State of Gujarat [(2006) 2 SCC 359 : (2006) 1 SCC (Cri) 499] wherein the accused was convicted under Sections 307/114 IPC and for the same the trial court sentenced the accused for 10 years. However, the High Court, in its appellate jurisdiction, reduced the sentence to the period already undergone. In that case, this Court held that the sentence imposed is not proportionate to the offence committed, hence not sustainable in the eye of the law. This Court observed thus: (SCC pp. 361-62, paras 7-8) "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.
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> 8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, 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."
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> 13. This position was reiterated by a three-Judge Bench of this Court in Ahmed Hussein Vali Mohammed Saiyed v. State of Gujarat [(2009) 7 SCC 254 : (2009) 3 SCC (Cri) 368], wherein it was observed as follows: (SCC p.

281, paras 99-100) "99. ... The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to (sic break the) law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. 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 resultwise counterproductive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

100. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the victim of the crime but the society at large while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong." In that case, the Court further goes to state that meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counterproductive in the long run and against the interest of the society.

14. In Jameel v. State of U.P. [(2010) 12 SCC 532 : (2011) 1 SCC (Cri) 582], this Court reiterated the principle by stating that the punishment must be appropriate and proportional to the gravity of the offence committed. Speaking about the concept of sentencing, this Court observed thus: (SCC p. 535, paras 15-16) "15. 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.

16. 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."

15. In Guru Basavaraj v. State of Karnataka [(2012) 8 SCC 734 : (2012) 4 SCC (Civ) 594 : (2013) 1 SCC (Cri) 972], while discussing the concept of appropriate sentence, this Court expressed that: (SCC pp. 744-45, para 33) "33. ... 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."

16. Recently, this Court in Gopal Singh v. State of Uttarakhand [(2013) 7 SCC 545 : (2013) 3 SCC (Cri) 608 : JT (2013) 3 SC 444] held as under: (SCC p. 551, para 18) "18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence."

17. We reiterate that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. 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. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. 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 court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment." Following principles can be deduced from the reading of the aforesaid judgment:

> Imprisonment is one of the methods used to handle the convicts in such a way to protect and prevent them to commit further crimes for a specific period of time and also to prevent others from committing crime on them out of vengeance. The concept of punishing the criminals by imprisonment has recently been changed to treatment and rehabilitation with a view to modify the criminal tendency among them.
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> There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.

Notwithstanding the above theories of punishment, when it comes to sentencing a person for committing a heinous crime, the deterrence theory as a rationale for punishing the offender becomes more relevant. In such cases, the role of mercy, forgiveness and compassion becomes secondary.

In such cases where the deterrence theory has to prevail, while determining the quantum of sentence, discretion lies with the Court. While exercising such a discretion, the Court has to govern itself by reason and fair play, and discretion is not to be exercised according to whim and caprice. 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.

While considering as to what would be the appropriate quantum of imprisonment, the Court is empowered to take into consideration mitigating circumstances, as well as aggravating circumstances.

When the Indian Penal Code provides discretion to Indian Judges while awarding the sentence, the Court will have undoubtedly regard to extenuating and mitigating circumstances. In this backdrop, the question is as to whether the respondent being a lady and having three minor children will be extenuating reasons? I may observe that in many countries of the world, gender is not a mitigating factor. Some jurists also stress that in this world of gender equality, women should be treated at par with men even as regards equal offences committed by them. Women are competing men in the criminal world; they are emulating them in all the crimes; and even surpassing men at times. Therefore, concept of criminal justice is not necessarily synonymous with social justice. Eugene Mc Laughlin shows a middle path. She finds that predominant thinking is that 'paper justice' would demand giving similar penalty for similar offences. However, when it comes to doing 'real justice', element of taking the consequences of a penalty cannot be ignored. Here, while doing 'real justice' consequences of awarding punishment to a female offender are to be seen. According to her, 'real justice' would consider the likelihood that a child might suffer more from a mother's imprisonment than that of his father's. Insofar as Indian judicial mind is concerned, I find that in certain decisions of this Court, gender is taken as the relevant circumstance while fixing the quantum of sentence. I may add that it would depend upon the facts of each case, whether it should be treated as a relevant consideration and no hard and fast rule can be laid down. For example, where a woman has committed a crime being a part of a terrorist group, mercy or compassion may not be shown.

In the present case, two mitigating circumstances which are pressed into service by the respondent are that she is a woman and she is having three minor children. This has to be balanced with the nature of crime which the respondent has committed. As can be seen, these circumstances were taken into consideration by the trial court and on that basis, the trial court took a lenient view by awarding imprisonment for two

years in respect of each of the offences under Sections 307, 328 and 392 of the IPC, which were to be run concurrently. There was no reason to show any further mercy by the High Court. Further, as found above, removing the element of imprisonment altogether was, in any case, erroneous in law. I, thus, allow this appeal and set aside the sentencing part of the judgment of the High Court and restore the judgment of the trial court.

.....J. (A.K. SIKRI) NEW DELHI;

APRIL 10, 2017.

REPORTABLE IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NO.....2017 (ARISING OUT OF SLP (Crl.)NO. 8983 OF 2012) STATE OF H. P. ....APPELLANT VERSUS NIRMALA DEVI ....RESPONDENT J U D G M E N T ASHOK BHUSHAN, J.

Leave granted. I had advantage of going through the erudite judgment of brother Justice A. K. Sikri and I am in full agreement with the opinion expressed by brother Justice A. K. Sikri. Looking to the importance of issues involved in this appeal, I have also penned my reasons.

2. State of Himachal Pradesh has filed this appeal, challenging the judgment of the High Court dated 03.07.2012 by which, criminal appeal filed by the respondent-accused had been decided, setting-aside the sentence of the imprisonment under Section 328, 392 and 307 IPC and modifying the fine of Rs. 2000/- to a fine of Rs. 30,000/-.

3. The brief facts necessary to be noted for deciding the issues raised in the appeal are:

a. On 22.08.2000, Rakesh Kumar (complainant), Resident of Preet Nagar, Jammu, left his house for withdrawing a sum of Rs. 27,000/- lying in his account in a bank at Satbari for purchasing an auto-tempo from Pathankot as the complainant was running a private school upto middle class in Jammu.

b. When the complainant was on his way to Bank and reached near Digyana Bus Stand, he met Krishan Lal Sharma (Accused No. 1) in his Maruti Van No. JK

-02M-4392.

c. Then the Accused No. 1 took the complainant to the house of his neighbour Smt. Nirmala Devi (respondent-accused). The Accused No. 1 informed the complainant that since the Respondent-Accused also had to go to Pathankot, therefore, they all would go together. In the house of the Respondent-Accused, the complainant was

offered a glass of water and thereafter a cup of tea after which the complainant suspected that he had been made to ingest some intoxicant. Thereafter, all boarded the van where the complainant became unconscious and did not remember as to where he was taken.

d. On 24.8.2000, the complainant made a statement to the Inspector/SHO Kishan Chand, P. S. Dalhousie, District Chamba at Civil Hospital, Dalhousie which was recorded under Section 154 Criminal Procedure Code narrating the whole incident mentioned above.

e. On the compliant, FIR No. 80 of 2000 was registered at P. S. Dalhousie. Upon investigation, it was found that the Accused No. 1 and Respondent- Accused had conspired to rob the complainant of his money. The Respondent- Accused mixed some tablet in the tea offered to the complainant because of which the complainant became unconscious. In the van, the complainant was strangulated with a green dupatta of Respondent-Accused. In the investigation, it was found out that both Accused No. 1 and Respondent- Accused after ensuring that the complainant had died, threw him down the road in a nullah near village Dhundiara. Thereafter, both went to Dalhousie and stayed at Kumar Hotel for night. The complainant was found lying in nullah by one Shri Tej Ram who had gone to his field to check the crops. The complainant was brought out from nullah by Tej Ram with the help of another person and then taken to private clinic. On getting the first aid, the complainant was taken to Civil Hospital in Dalhousie where the statement was made.

f. On 19.04.2002, Accused No. 1 was convicted and sentenced for offences punishable under Section 328, 392, 397 IPC vide judgment dated 19.4.2002. During the trial of the Respondent-accused, she was declared proclaimed offender. Upon being apprehended, the remaining prosecution witnesses were recorded.

4. The learned Sessions Judge convicted the respondent-accused for offences under Section 328, 392 and 397 read with Section 34 IPC. After recording the conviction, the learned Sessions Judge imposed following sentence:

".....she is ordered to undergo simple imprisonment for a period of two years and to pay fine in the sum of Rs. 2,000/- in default of payment of which to undergo imprisonment for a further period of three months for the offence punishable under Section 328 IPC, simple imprisonment for a period of two years and also to pay fine in the sum of Rs. 2,000/- in default of payment of which to undergo simple imprisonment for a further period of three months for the offence punishable under Section 307 IPC and to undergo simple imprisonment for a period of two years and to pay fine in the sum Rs. 2,000/- in default of payment to which to undergo simple imprisonment for a further period of three months for the offence punishable under Section 392 IPC. All the substantive sentences are ordered to run concurrently."

5. The respondent filed Criminal Appeal No. 79 of 2003, which had been heard and decided by High Court vide its judgment dated 03.07.2012. High Court taking a lenient view on sentence decided the appeal by passing the following order:

"However, on the conspectus of the material on record, it would be in the fitness of things in case the sentence of imprisonment under each head is set aside and instead a fine of Rs. 30, 000/- is imposed upon the appellant with a direction that the amount be deposited in the Court of learned Sessions Judge, Chamba, Division Chamba within a period of six months from today failing which the sentence of imprisonment shall revive. On deposit of such fine, it shall be paid to the complainant. A direction is issued to the learned Sessions Judge, Chamba to comply with this judgment."

6. We have heard learned counsel for the State of Himachal Pradesh, Ms. Promila and Shri K. K. Mani for the accused. Learned counsel for appellant in support of appeal contends that High Court erred in setting-aside the sentence of imprisonment by substituting it, by enhancement of the amount of fine. The reduction of sentence by the High Court was not in accordance with the provisions of Indian Penal Code. The order passed by Appellate Court is not in accordance with the power given under Section 386 of the Code of Criminal Procedure 1973 (hereinafter referred to as "the Code"). High Court while exercising the power under Section 386(b) of the Code could have reduced the sentence, but while maintaining the finding of the guilt could not have set-aside the sentence of imprisonment.

7. Learned counsel for the respondent-accused submitted that High Court has rightly enhanced the fine by setting-aside the sentence of imprisonment in view of the facts & circumstances of the case. The respondent-accused being a lady, who had to look after three minor sons, out of them two being mentally unsound, sentence of imprisonment has rightly been set-aside. The judgment and order of the High Court being just and equitable, this Court need not interfere with the alteration of sentence ordered by the High Court.

8. We have considered the submissions of the learned counsel for the parties and have perused the record carefully. The only issue, which arises in this appeal for determination is, as to whether, the High Court in exercise of its appellate jurisdiction under Section 386 of the Code could have set-aside the sentence of imprisonment, as imposed by trial court under Section 328, 392 and 307 IPC by enhancing the amount of fine to Rs. 30,000/- from the fine Rs. 2,000/- as ordered by trial court.

9. Section 386 of the Code provides for 'power of the Appellate Court'. Section 386 of the Code which is relevant for the present case is quoted below:

"386.Powers of the Appellate Court. - After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

10. A perusal of the judgment of the High Court indicates that the High Court had not interfered with the finding of guilt as recorded by the trial court. In para 10 of the judgment, High Court stated as follows:

"Further from the fact that the money has been recovered from the accused, there is no doubt in mind that the appellant is guilty for the offences as charged. I cannot accept this submission that the evidence of the witnesses does not prove the guilt of the accused. There is thus no merit in this appeal which is accordingly dismissed."

11. High Court thus has not reversed the finding of the guilt and without altering the finding of the guilt recorded by trial court, has altered the sentence. In altering the sentence High Court has exercised its power under Section 386(b)(iii) of the Code. What is the meaning and content of 'Statutory Scheme' as delineated by the words 'alter the nature or the extent of the sentence, but not so as to enhance the same' has to be considered and answered in this appeal. Whether in altering the sentence, the High Court is empowered to alter the sentence to an extent which could not have been awarded by the trial court after recording the finding of the guilt?

12. In the present case, accused has been convicted under Sections 307, 328 and 392 IPC. It is useful to look into the above provisions to find out nature of sentence which could be awarded for an offence under the aforesaid sections. Sections 307, 328 & 392 IPC are extracted as below: "307. Attempt to murder.— Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to 1[imprisonment for life], or to such punishment as is hereinbefore mentioned.

Attempts by life convicts.—2[When any person offending under this section is under sentence of 1[imprisonment for life], he may, if hurt is caused, be punished with death.]

328. Causing hurt by means of poison, etc., with intent to commit an offence.— Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

392. Punishment for robbery.— Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and

sunrise, the imprisonment may be extended to fourteen years."

13. The trial court after holding the accused guilty has sentenced her for rigorous imprisonment of two years with fine of Rs.2,000/- in default of payment, further simple imprisonment for a period of three months for each of the above offences.

14. What is the content and meaning of the word 'shall be punished with rigorous imprisonment, which may extend to ten years, and shall also be liable to fine', whether after finding the accused guilty of the aforesaid offences, the trial court could have imposed sentence only of a fine or it was incumbent on the trial court to impose the sentence of imprisonment as well as fine?

15. The Scheme of Section 53 of the Indian Penal Code enumerates the punishments. Both imprisonment of either description i.e. rigorous or simple and fine are included within the punishments. The Scheme of the Indian Penal Code indicates that for different offences different punishments have been provided for. Chapter XVI of the Indian Penal Code deals with 'all offences affecting the human body'. The punishment for an offence of attempt to murder under Section 307 IPC as noted above, is imprisonment and fine. There are several other offences in the same chapter where sentence provided is imprisonment or fine or both. Section 309 of IPC provides for punishment for an offence to attempt suicide. Section 309 of IPC is quoted as below:

"309. Attempt to commit suicide.—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall he punished with simple imprisonment for a term which may extend to one year 1[or with fine, or with both]."

16. Prior to amendments made in Section 309 by Act 8 of 1882, the punishment provided for Section 309 was 'simple imprisonment for a term, which can be extended to one year or, and shall also be liable to fine. By the above amendments of 1882 the words 'and shall also be liable to fine' have been deleted and substituted by the words 'or with fine or with both'. The legislature is thus well aware of the distinction between the punishment which provides imprisonment and with fine and punishment by imprisonment or fine or by both. Where punishment provided is both by imprisonment and fine, can Court punish only with fine ?

17. In the present case, High Court by its judgment has punished the accused only with fine after affirming the finding of the guilt recorded by the trial court.

18. In an early decision of Allahabad High Court in Badri Prasad Vs. Emperor, (1922) ILR 44 All 538, the Division Bench of the Court had occasion to consider the punishment in context of Section 392 IPC. In the above case for an offence under Section 392 IPC, the Magistrate inflicted a fine of Rs.100/- with an alternative period of imprisonment, and if the fine was not paid with the further sentence of 30 stripes.

Appeal was filed by Badri Prasad which was admitted upon the question of sentence. A notice was also issued by the High Court why sentence should not be enhanced or otherwise altered.

19. Chief Justice Edward Grimwood Mears in his separate judgment held as follows:

".....In these circumstances, the Magistrate inflicted a fine of Rs. 100 with an alternative period of imprisonment, if that fine was not paid, and sentenced Badri Prasad also to thirty stripes. Badri Prasad preferred an appeal to this Court and it has been admitted upon the question of sentence only-and, at the same time, notice has been served on him to show cause why the sentence should not be enhanced or otherwise altered. This was a charge under Section 390 and the penalty is prescribed under Section 392. An examination of that section shows that a fine alone is not a permitted punishment for a robbery. Robbery, under these circumstances, may be punished by rigorous imprisonment and by a fine, and in certain cases by whipping in addition. But the Magistrate erred in law in sentencing the accused to a fine and a fine unaccompanied by imprisonment....." ".....Therefore, I defer very gladly to what I have no doubts is in this case Mr. Justice Bannerji's better judgment on the matter, I am quite in accord with him that there must be a substantial period of imprisonment and, therefore, we alter the nature of the punishment which Badri Prasad must undergo, and we sentence him to twelve months' rigorous imprisonment with effect from the date of his arrest. We maintain the fine of imprisonment with the alternative period of imprisonment if that fine be not paid, and we wipe out that part of the sentence which orders him to receive a whipping."

20. Justice Pramoda Charan Bannerji, in his separate judgment stated the following:

"I am of opinion that the Court below was wrong in not inflicting on the appellant a sentence of imprisonment. A sentence of imprisonment is an essential sentence under Section 392 of the Indian Penal Code. To this sentence a fine may be added and, under Section 4 of the Whipping Act, a sentence of whipping may be imposed where, in the commission of robbery, hurt is caused. Therefore, the sentence of fine only was an illegal sentence, and a sentence of imprisonment ought to have been imposed."

21. Judgment in M/s. Rajasthan Pharmaceutical Laboratory, Bangalore and Two Others versus State of Karnataka, (1981) 1 SCC 645, is also relevant to be referred to. In the above case, the Court had occasion to examine Section 27a(ii) and Section 34(2) of Drugs & Cosmetics Act, 1940. Section 27a(ii) also contains punishment "shall be punishable with imprisonment for a term, which shall not be less than one year but which may extend to ten years and shall also be liable to fine".

22. In para 5 of the judgment, the above provision has been extracted as below:

"5. Chapter IV of the Act, headed "Manufacture, Sale and Distribution of Drugs and Cosmetics" includes Section 16 to Section 33A. Section 18 provides inter alia :

.....no person shall himself or by any other person on his behalf-

(a) manufacture for sale, or sell, or stock or exhibit for sale, or distribute-

(i) any drug or cosmetic which is not of standard quality;

(b) .....

(c) manufacture for sale, or sell, or stock or exhibit for sale or distribute any drug or cosmetic, except under, and in accordance with the conditions of, a licence issued....

* * * * *

Section 18-A is in these terms:

Disclosure of the name of the manufacturer, etc.- Every person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall, if so required, disclose to the Inspector the name, address and other particulars of the person from whom he acquired the drug or cosmetic.

Section 27 which enumerates the penalties for illegal manufacture, sale, etc., of drugs reads-

Whoever himself or by any other person on his behalf manufactures for sale, sells, stocks or exhibits for sale or distributes-

(a) any drug-

(i) .....

(ii) without a valid licence as required under clause (c) of Section 18, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years and shall also be liable to fine:

Provided that the Court may, for any special reasons to be recorded in writing, impose a sentence of imprisonment of less than one year;

(b) any drug other than a drug referred to in clause (a) in contravention of any of the provisions of this Chapter or any rule made thereunder shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

Section 28 provides for "penalty for non-disclosure of the name of the manufacturer, etc." and states:

> Whoever contravenes the provisions of Section 18-A shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five hundred rupees, or with both."

23. In the above case, High Court has found the accused guilty for an offence under Section 18(c) of the Act for which, they were punished under Section 27(a)(ii). High Court sentenced each of the three appellants to pay a fine of Rs.2,000/- on each of the count.

24. This Court in para 7 had stated as follows:

"7. The High Court imposed a fine of two thousand rupees on each of the three appellants for the offence under Section 18(c). Section 27(a)(ii) makes a sentence of imprisonment of not less than one year compulsory for such offence in addition to fine unless for special reasons a sentence of imprisonment for a lesser period was warranted."

25. This Court remitted the case to consider again on the findings already recorded for the question of sentence. In para 8 following was stated: -

"8. In the result, while maintaining the conviction of the appellants, we remit the case to the High Court; the High Court will consider again on the findings already recorded the question of sentence-(a) for the offence under Section 18(c) punishable under Section 27(a)(ii) so far as appellants 2 and 3 are concerned, and (b) for the offence punishable under Section 28 of which all the three appellants have been found guilty,- and pass appropriate sentences. The appeal is allowed to the extent and in the manner indicated above."

26. Another judgment which needs to be noted is Zunjarrao Bhikaji Nagarkar versus Union of India and Others, (1999) 7 SCC 409.

27. In the above case, this Court had considered Section 325 IPC and the phrase 'and shall also be liable to fine'. The Court held that when the punishment provided is for sentence of imprisonment and also with fine, the imprisonment and fine both are imperative. In para 37, 38 & 39 following was stated:

"37. Penalty to be imposed has to be in commensurate with the gravity of the offence and the extent of the evasion. In the present case, penalty could have been justified. Appellant was, however, of the view that imposition of penalty was not mandatory. He could have formed such a view. Under Section 325 of the Indian Penal Code, a person found guilty "shall be punished with imprisonment of either description for a

term which may extend to seven years, and shall also be liable to fine". Section 63 IPC provides that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive. A Single Judge of the Patna High Court in Tetar Gope v. Ganauri Gope took the view that expression "shall also liable to fine" in Section 325 IPC does not mean that a sentence of fine must be imposed in every case of conviction in that section. He said:

“Such an expression has been used in the Penal Code only in connection with those offences where the legislature has provided that a sentence of imprisonment is compulsory. In regard to such offences, the legislature has left a discretion in the Court to impose also a sentence of fine in appropriate cases in addition to the imposition of a sentence of imprisonment which alone is obligatory.”

38. We do not think that the view expressed by the Patna High Court is correct as it would appear from the language of the section that sentences of both imprisonment and fine are imperative. It is the extent of fine which has been left to the discretion of the court. In Rajasthan Pharmaceuticals Laboratory v. State of Karnataka this Court has taken the view that imprisonment and fine both are imperative when the expression "shall also be liable to fine" was used under Section 34 of the Drugs and Cosmetics Act, 1940. In that case, this Court was considering Section 27 of the Drugs and Cosmetics Act, 1940, which enumerates the penalties for illegal manufacture, sale, etc., of drugs and is as under -

“27. Whoever himself or by any other person on his behalf manufacture for sale, sells, stocks or exhibits for sale or distributes -

(a) any drug -

(i) * * *

(ii) without a valid licence as required under clause(c) of Section 18, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years and shall also be liable to fine:

Provided that the court may, for any special reasons to be recorded in writing, impose a sentence of imprisonment of less than one year;

* * *”

39. This Court said that the High Court imposed a fine of two thousand rupees on each of the three appellants for the offence under Section 18(c) of the Act when Section 27(a)(ii) makes a sentence of imprisonment of not less than one year compulsory for such offence in addition to fine unless for special reasons a sentence of imprisonment for a lesser period was warranted. It would thus appear that this

Court was of the opinion that in such a case imprisonment and fine, both are imperative." * * * *

28. Thus, the punishment provided in aforesaid sections which contains the imprisonment and shall also be liable to fine has to be read to mean that offence being proved under Section 307, 329 and 392 IPC the punishment of imprisonment and fine are imperative.

29. As noted above, the Indian Penal Code contains a well thought and carefully considered a regime of punishment. For graver offences, severe punishments have been provided, where it was thought to provide lesser punishment, option of imprisonment or fine has been provided for as noted, in the Scheme of Section 309 of IPC. The punishment provided in Section 307, 328 and 392 IPC are those which have been provided for serious offences and it cannot be countenance that the offence having been proved the punishment can only be a fine.

30. In case, such interpretation is accepted those offenders in the society, who are financially well-off can well get away only with punishment of a fine, which shall neither be in the interest of society nor in accordance with the scheme of punishment, as delineated in Indian Penal Code.

31. The trial court has awarded the sentence of two years imprisonment with fine of Rs. 2,000/- for each of the aforesaid offences, which was in accordance with the Statutory Scheme. We are thus of the clear opinion that punishment under Section 307, 328 and 392 IPC cannot only be a fine, imprisonment is an imperative part of punishment.

32. Now, let us examine, as to whether under Section 386 of the Code which empowers the Appellate Court to alter the nature or the extent or nature and extent of sentence empowers the Appellate Court to alter the sentence of imprisonment and fine into a sentence of fine only. The power of the Appellate Court, as contained under Section 386 is coextensive with the power of trial court. In a case, where trial court had acquitted an accused under Section 386(a), the Appellate Court can reverse an order of acquittal and hold the accused guilty and pass such sentence on him according to law.

33. Thus, even when the Appellate Court has been given power to reverse an acquittal and hold the accused guilty, the power to pass sentence is to be exercised "according to" law. The word 'according to law' clearly indicates the sentence as provided under the Indian Penal Code. Thus power of Appellate Court to sentence an accused after holding him guilty has to be in accordance with the punishment as provided under Indian Penal Code.

Thus, while exercising power under Section 386(b) when the Appellate Court has been given power to alter the nature or the extent or nature and extent both of the sentence, altering of the sentence has also to be in accordance with the Scheme of punishment as contained in the Indian Penal Code.

34. Appellate Court cannot exercise its power under 386(b)(iii) to alter the sentence of the imprisonment and fine into a sentence of only a fine, which shall be contrary to the Statutory Scheme. In event, such power is conceded to Appellate Authority to alter a sentence of imprisonment and fine with sentence only of a fine, the consequences will be unfair and unjust.

35. In a case of murder, it is relevant to note that under Section 302 IPC also, punishment is with death, or imprisonment for life, and shall also be liable to fine. Imprisonment for life, on the above interpretation, can also be converted only into fine, which is clearly impermissible and not in accordance with the Scheme of Indian Penal Code. Thus, no interpretation can be put to Section 386(b)(iii) except that the power of the Appellate Court to alter the sentence awarded by trial court has to be in accordance with law i.e. sentencing provisions as contained in the Indian Penal Code.

36. There is one more aspect of the matter which needs to be noted. Section 386 Sub clause (b)(i) uses the phrase 'reverse the finding and sentence, whereas Sub clause (iii) uses the phrase 'alter the nature or the extent or the nature and the extent of the sentence'. There is a difference between the word 'reverse' and 'alter', both have been made, contemplating different consequences and circumstances.

37. This Court, in State of Andhra Pradesh versus Thadi Narayana AIR 1962 SC 240 in para 12, while considering the word reverse and alter used in Section 423 akin to Section 386 of the Code, stated as following:

> "12. The word "alter" must in the context be distinguished from the word "reversed". Whereas, under S. 423(1)(b)(1)power is conferred on the High Court to reverse the order of conviction the power conferred on the Appellate Court by the expression "alter the finding" is merely the power to alter. Reversal of the order implies its obliteration, whereas alteration would imply no more than modification and not its obliteration."

38. Setting aside the sentence of punishment, as done by the High Court in the present case amounts to reversal of the sentence and cannot mean alteration of sentence.

39. There cannot be any dispute as to the power of the Appellate Court to alter the nature and extent of the sentence without altering the finding. Thus, even in a case when High Court affirms the finding of guilt, the nature and extent of sentence can very well be altered. The Appellate Court taking into consideration the case can alter/reduce the sentence.

40. In the present case, the High Court has affirmed the finding of the guilt but has erroneously set-aside the sentence of imprisonment by providing for fine of Rs. 30,000/- only.

41. The State in this appeal has challenged the order passed by the High Court modifying the sentence. The High Court has modified the sentence taking into consideration that appellant lady has to take care of her three minor sons, out of them two are mentally retarded. The trial court, while sentencing the accused had already taken the aforesaid fact into consideration. In para 27 of the judgment trial court has noticed following:

> "27.The convict was heard on the quantum of punishment. She pleased for a lenient view being the first offender and a young lady of about 40 years in age. She also stated that she has three minor sons and out of them two are mentally unsound."

42. Trial court, while sentencing the appellant has thus taken above circumstances into consideration and for offences under Section 328, 307 and 392 IPC has awarded imprisonment of two years only with a fine of Rs. 2,000/- each.

43. The maximum sentence under Section 328 is ten years, under Section 307 is ten years and in case of hurt, it is life imprisonment or such punishment, as mentioned above. In Section 392 IPC, the maximum punishment is for the period of fourteen years.

44. We are thus of the view that the fact that accused has three minor sons, out of them two are mentally retarded, was taken into consideration by trial court and after considering the aforesaid fact, sentence of imprisonment of only two years was ordered.

45. In view of the foregoing discussion, we are of the view that order of the High Court, modifying the sentence is unsustainable and is hereby set- aside. Judgment and order of the trial court dated 05.03.2003 is restored.

46. The appeal is allowed. The accused shall be taken into custody for serving the sentence.

.....J [ASHOK BHUSHAN] New Delhi April 10, 2017.

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 667 OF 2017
[Arising out of SLP (Crl.) No. 8983 of 2012]

STATE OF HIMACHAL PRADESH	.....APPELLANT(S)	
VERSUS		
NIRMALA DEVI	.....RESPONDENT(S)	

ORDER OF THE COURT

The appeal is allowed. Judgment of the High Court is set aside to the extent it modifies the sentence and the sentence of imprisonment as awarded by the trial court is restored herewith. The respondent shall be taken into custody to serve the sentence.

No costs.

.....J. (A.K. SIKRI) .....J. (ASHOK BHUSHAN)
NEW DELHI;

APRIL 10, 2017.

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[2] (1999) 7 SCC 409 [4] (2014) 6 SCC 466 [6] (2015) 7 SCC 359 [8] (2013) 9 SCC 516