Bhupinder Sharma vs State Of Himachal Pradesh on 16 October, 2003

Equivalent citations: AIR 2003 SUPREME COURT 4684, 2003 (8) SCC 551, 2003 AIR SCW 5493, 2004 SCC(CRI) 31, 2004 (1) UJ (SC) 495, 2003 (8) SCALE 735, 2003 CRI(AP)PR(SC) 652, 2003 (12) ALLINDCAS 794, 2003 (7) SLT 11, 2004 (1) SRJ 244, (2004) 1 GUJ LR 761, (2004) 1 ALLCRILR 115, (2004) 2 ALLCRILR 498, (2003) 8 SCALE 735, (2004) SC CR R 488, 2004 CHANDLR(CIV&CRI) 259, (2003) 4 CURCRIR 340, (2003) 9 ALLINDCAS 676 (KAR), (2003) 3 KCCR 2370, (2003) 12 INDLD 54, (2003) 4 RECCRIR 960, (2004) 27 OCR 178, (2004) 2 RAJ CRI C 341, (2004) 1 SIM LC 150, (2004) 1 ALLCRIR 573, (2004) 1 UC 379, (2004) 2 BOMCR(CRI) 142, (2003) 47 ALLCRIC 1107, (2004) 1 CHANDCRIC 165

Author: Arijit Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  1265 of 2002

PETITIONER:
BHUPINDER SHARMA

RESPONDENT:
STATE OF HIMACHAL PRADESH

DATE OF JUDGMENT: 16/10/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
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JUDGMENT 2003 Supp(4) SCR 792 The Judgment was delivered by ARIJIT PASAYAT, J.

Enhancement of sentence from four years RI as awarded by the trial Court to 10 years as done by the Himachal Pradesh High Court for an offence of rape punishable under Section 376 of the Indian Penal Code 1860, (in short 'the IPC') is the subject matter of challenge in this appeal.

2. We do not propose of mention name of the victim. Section 228-A of the Indian Penal Code, 1860 (in short the 'IPC') makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an

offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of presenting social victimization or ostracisms of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of High Court or lower Court, the name of the victim should not be indicated. We have chosen to describe her as 'victim' in the judgment.

3. While issuing notice by order dated 8.1.2002 it was clearly indicated by this Court that examination of the case would be restricted to the question of sentence only. Appellant was found guilty of offence punishable under Section 376 read with Section 34 IPC and Section 342 read with Section 34 thereof. The enhancement of sentence was done in respect of offence punishable under Section 376 IPC.

4. Prosecution version as unfoled during trial is that the victim aged about 16 years had gone to Solan in 1998 to purchase medicines for her ailing grandfather. She had gone to Solan for the first time and reached the bus stand at about 2.00 p.m. After having alighted from the bus, she enquired from a lady as to where a particular medicine shop was located. The lady stated ignorance. At this juncture, two persons came there and asked her to accompany them in a three-wheeler as they were both going to the accused shop. The victim was taken by two boys namely, accused Ashish Kanwar and Suresh to an isolated place in a jungle. The three-wheeler was sent back with a direction to come in the evening. After gagging her mouth, she was taken to a house which was below the road. There were four more boys. Three out of those were identified by the victim during trial. The fourth one namely Shankar was not tried as adequate evidence was not available against him. The victim was sexually abused firstly by accused- Ashish followed by accused-Sunil, Suresh and Ruby. The appellant Bhupinder and Shankar (not tried) were in the process of taking off their clothes with a view to perpetuate sexual abuse when the victim managed to escape with only a shirt and ran away bare footed. When she reached near the road, she wasmet Chaman Lal, ASI who was accompanied by police officers. Meanwhile, two other persons also came there. They were Charanjit (PW-2) and Balvinder (PW-3). When the victim described the ghastly incident to them, she was taken to the room where she had been raped; but it was found that all six of them had fled away. Police took into possession certain articles. Statement of the victim was recorded and investigation was undertaken. She was sent for medical examination where she was examined by Dr. Radha Chopra (PW-8). All the convicts were arrested during investigation. Forensic Laboratory tests were conducted and charge sheet was placed under Section 376 read with Section 34 IPC and Section 342 read with Section 34 IPC. The accused persons pleaded not guilty. After conclusion of trial all of them were found guilty and convicted to undergo different sentences. The present appellant Bhipinder was sentenced to undergo RI for four years for the offence relatable to Section 376 read with Section 34 IPC and two years for the offence punishable under Section 342 read with Section IPC. All the other accused persons were convicted to RI for 7 years for the offence punishable under Section 376 and 342 IPC.5. In case of present appellant, a departure was made so far as sentence is concerned because trial Court was of the view that he had not actually committed rape and the victim had escaped before he could do so. The High Court issued suo motu notice of enhancement of sentence in respect of appeals filed by the present appellant Bhipinder and accused Ashish.

6. Before the High Court the evidence of victim was stated to be tainted and it was also submitted that the consent was writ large and, therefore, offence under Section 376 was not made out. It was urged that there was no corroboration to the evidence of the victim and, therefore, the prosecution version should not have been accepted.

7. The High Court found that the evidence was cogent and confirmed the conviction. It took note of Explanation I to sub-section (2) of Section 376 IPC as the case was one of gang rape. It was observed that not only said Explanation I but also provisions of the Section 114-A of the Indian Evidence Act, 1872 (in short the 'Evidence Act') applied. Accordingly it was held that involvement of accused appellant Bhupinder cannot be ruled out though he may not have actually raped the victim. In view of the specific provision relating to sentence and in the absence of any adequate and special reason having been indicated by the Trial Judge, the minimum sentence was to be imposed. With these findings the sentence was enhanced as aforesaid.

8. We have heard learned counsel for the respondent-State. He pointed out that the minimum sentences are prescribed for the offence of rape under Sub-sections (1) and (2). Sub-section 2(1)(g) of Section 376 refers to gang rape, Explanation (1) by a deeming provision makes every one in a group of persons acting in furtherance of their common intention guilty of offence of rape and each is deemed to have committed gang rape, even though one or more of them may not have actually committed rape. Unfortunately, there was no appearance on behalf of the accused-appellant and ultimately after the hearing was over and the judgment was reserved and after considerable time thereof appearance was made by learned counsel for the accused appellant. In view of the continued absence without any justifiable reason, and since the matter was closed after hearing learned counsel for the respondent at length, the learned counsel for the accused-appellant though made a request to grant an opportunity of being heard, was only granted permission to file written notes of argument keeping in view that the quantum of sentence alone was to be subject matter of consideration.9. The stand as appears from the memorandum of appeal and the written submissions made is that at the most the appellant can be held guilty of an attempt to commit the offence and not commission of the offence itself. The evidence is also claimed to be unreliable in the absence of corroboration and the telltale symptoms of consent. Regarding quantum of sentence personal and family difficulties are urged, as extenuating circumstances.

10. The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Sections 375, 376, 376-A, 376-B, 376-C, and 376-D, 'Rape' is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, i.e. 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-B; or as expressed more fully, 'rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will' (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but

carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon.6, 1a, 9 Edw. 4, 26 a (Hale PC 628). In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's 'Criminal Law "9th Ed. p.262). In 'Encyclopoedia of Crime and Justice' (Volume 4, page 1356) it is stated"

> .. even slight penetration is sufficient and emission is unnecessary'. In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

11. 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. A similar view was expressed by this Court in Rafiq vs. State of U.P. 1981 AIR(SC) 96) with some anguish. The same was echoed again in Bharwada Bhogiabhai and Hirjibhai vs. State of Gujarat 1988 AIR(SC) 753). It was observed in the said case that in the Indian Setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in Rameshwar vs. The State of Rajasthan 1952 AIR(SC) 54) were, "The Rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge.."

12. To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her chain of rape will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. (See State of Maharashtra vs. Chandra Prakash Kewalchand Jain 1990 AIR(SC) 658). Why should be the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance.

13. It is unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. Decency and morality in public and social life can be protected only if Courts deal strictly with those who violate the social norms. Two alternative custodial punishments are provided; one is imprisonment for life or with imprisonment of either description for a term which may extend to ten years. The latter is the minimum, subject of course to the proviso which authorizes lesser sentence for adequate and special reasons.

14. In cases of gang rape the proof of completed act of rape by each accused on the victim is not required. The statutory intention in introducing Explanation (1) in relation to Section 376(2)(g) appears to have been done with a view to effectively deal with the growing menace of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty of gang rape and convict them under Section 376 IPC. (See Pramod Mahto and others vs. The State of Bihar 1989 AIR(SC) 1475).

15. Both in cases of sub-sections (1) and (2) the Court has the decision to impose a sentence of imprisonment less than the prescribed minimum for 'adequate and special reasons'. If the Court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum.16. In other to exercise the discretion of reducing the sentence the statutory requirement is that the Court has to record 'adequate and special reasons' in the judgment and not fanciful reasons which would permit the Court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but special. What is adequate and special would depend upon several factors and no strait-jacket formula can be imposed. In the case at hand, only reason which seems to have weighed with the trial Court is that the present accused appellant had not actually committed the rape. That cannot be a ground to warrant lesser sentence; more so in view of Explanation (1) to sub-section (2) of Section

376. By operation of a deeming provision a member of a group of persons who have acted in furtherance of their common intention per se attract the minimum sentence. Section 34 has been applied by both the trial Court and the High Court, to conclude that rape was committed in furtherance of common intention. Not only was the accused-appellant present, but also he was waiting for his turn, as evident from the fact that he was in the process of undressing. The evidence in this regard is cogent, credible and trustworthy. Since no other just or special reason was given by the trial Court nor could any such be shown as to what were the reasons to warrant a lesser sentence, the High Court was justified in awarding the minimum prescribed sentence. That being the position, this appeal is dismissed.