Kamal Kishore vs State Of Himachal Pradesh on 25 April, 2000

Equivalent citations: AIR 2000 SUPREME COURT 1920, 2000 (4) SCC 502, 2000 AIR SCW 1540, 2000 (4) SCALE 52, 2000 SCC(CRI) 833, 2000 (3) LRI 991, (2000) 5 JT 202 (SC), 2000 (5) SRJ 322, 2000 (5) JT 202, (2000) 2 KER LT 49, 2000 CRILR(SC&MP) 531, 2000 CRILR(SC MAH GUJ) 531, (2000) 2 RECCRIR 426, 2000 CHANDLR(CIV&CRI) 201, (2000) 3 CRIMES 76, (2000) 83 DLT 401, (2000) 28 ALLCRIR 1252, (2000) 2 ALLCRILR 670, (2000) 3 SUPREME 762, (2000) SC CR R 646, (1999) 4 CURCRIR 339, (2000) 2 CRIMES 285, (2000) 2 EASTCRIC 693, (2000) 2 MADLW(CRI) 756, (2000) MAD LJ(CRI) 834, (2000) 3 PAT LJR 20, (2000) 2 RECCRIR 679, (2000) 2 CURCRIR 180, (2000) 4 SCALE 52, (2000) 41 ALLCRIC 176, (2000) 2 CHANDCRIC 120, (2000) 53 DRJ 8, 2000 (2) ANDHLT(CRI) 15 SC, (2000) 2 ANDHLT(CRI) 15

Bench: K. T. Thomas, Doraiswamy Raju, S.N. Variava

CASE NO.:
Appeal (crl.) 1332 of 1999

PETITIONER:
KAMAL KISHORE

Vs.

RESPONDENT:
STATE OF HIMACHAL PRADESH

DATE OF JUDGMENT: 25/04/2000

BENCH:
K. T. THOMAS, DORAISWAMY RAJU & S.N. VARIAVA

JUDGMENT:

Thomas J.

L...I...T.....T.....T.....T.....T.....T.....T..J The victim of a rape had just crossed single digit in her age. So tender was that lass when she was ravished. But the damage caused to her genitalia was woeful. The girl narrated the story before Ms. Kiran Agarwal, Sessions Judge, Una (Himachal Pradesh) who tried the case, but the story told by her did not impress the Sessions Judge and hence

her testimony was jettisoned and the man who was arraigned as the rapist exonerated. However, a Division Bench of the High Court of Himachal Pradesh dissented from the said verdict and convicted him under Section 376 of the Indian Penal Code. Nonetheless, the Division Bench was not disposed to award the minimum sentence prescribed by law for the offence on the premise that the accused who was twenty five "might have settled in life." So the High Court directed him to undergo rigorous imprisonment for three years and to pay a fine of Rupees ten thousand.

The verdict of the High Court did not satisfy both sides

- the accused and the State of Himachal Pradesh. The former because of the reversal of the order of acquittal and the latter because of the inadequacy of the sentence. So both sides filed separate appeals by special leave. We heard both appeals together.

The case put forward against the accused can be summarised in the following lines: -

Shishna Devi (PW2) is the eldest of the three children of Sher Singh and his wife Kunta Devi. During the year of occurrence Sheshna Devi was studying in the 4th class. Accused Kamal Kishore was running a flour mill located adjacent to his house. The incident happened on 21.5.1989. Shishna Devi after taking her evening meals proceeded to the house of her aunt, but on the way she stepped into the house of the accused presumably for viewing a TV film. Either at the end of the film or a little before it Shishna Devi was asked by the mother of accused to fetch some cooking utensils from the flour mill. So she went and brought the utensils to the kitchen. It was right time and the accused followed her upto the kitchen. He caught hold of her from behind, muffled her mouth, lifted her up and took her to the flour mill and after dragging her to a side room, stripped her off and he committed rape on her.

When the wearing apparels of Shishna Devi became wet with blood the accused brought a bucket of water and washed the dress. He threatened her not to reveal it to anybody else. The house of her aunt (Kaushalya Devi - PW4) was located close by and Shishna Devi instead of going back to her own house went to that aunt's house and spent the night there.

Next morning Shishna Devi returned home. Her mother Kunta Devi (PW-3) noticed blood stains on her dress and she enquired about the cause of it. Shishna Devi then narrated the incident to her mother. Her husband (father of Shishna Devi) was not in the house then as he had gone for his work. (He is a daily-wage earning labourer). Next day when he returned home the story was narrated to him. On hearing the same he wanted to report the matter to the police and hence he took his wife and Shishna Devi to Bangana police station and lodged Ex. PC complaint.

Shishna Devi was examined by PW 14 Dr. JS Kanwar of the Indira Gandhi Medical College (Shimla) at 4.30 pm on 23.5.1989. The doctor noted the following features on her person.

1. Congestion (contusion) of labia minora both sides.

2. Tear in the perennial fourchete in mid-line involving vaginal mucosa and perineal skin (3/4th cm long in skin). Swelling and tenderness noted at that site.

3. Congestion and oedema of vestibule around Urethra.

4. Hymen showed lacerations on the left side. There was oedema and tenderness. It was bleeding on touch.

According to PW-14, the injuries could probably had been sustained 24-48 hours prior to his examination of the girl. The doctor collected the swab from the posterior fornix of the vagina, and that along with the wearing apparels of Shishna Devi were sent for chemical tests. The result of such test showed spermatozoa and semen.

The aforesaid materials are sufficient to show, beyond any spec of doubt, that Shisna Devi was sexually ravaged by a man. Hence the only question which fell for consideration is whether it was the accused who did the act on that little girl. No question of consent of the victim need vex the judicial mind in this case as the age of Shishna Devi then was far distal from the age of 16.

For the narrowed compass of consideration in this case i.e. whether accused was the rapist, the most decisive evidence is the testimony of the victim herself. None else will be more competent than her to tell the court as to who raped her. There is no scope for doubting that she would not have seen the person who seduced her. PW-2 Shishna Devi pointed at the accused in unmistakable terms as the person who ravaged her. On that aspect there was no discrepancy in the evidence. But the Sessions Judge went into the details of the occurrence and after dwelling on certain features thereof the case was dubbed as highly improbable.

Learned Sessions Judge pointed out from the evidence of PW-2 that the time of her visit to the house of the accused was 6 P.M. for viewing the TV film, and then referred to the evidence of her aunt Kaushalya Devi (PW-4) that Shishna Devi reached her house at 11 P.M. The Sessions Judge made the following comment on that aspect:

> "Now it remains a mystery where the prosecutrix remained upto 11 p.m. Even if the watching of the film on the television by the prosecutrix in the house of accused for some time is construed to be one hour or two hours, 10-15 minutes in bringing the utensils from the flour mill and half an hour in the process when the accused-petitioner dragged her from the kitchen to the room by the side of the flour mill and raping her and then bringing a bucket of water with which she washed her shirt, even then there remains a considerable period of about two hours till 11 O' Clock at night when the prosecutrix reached the house of her aunt Kaushlya Devi where she slept for the night. Thus the unexplained time gap makes the deposition of the prosecutrix highly improbable."

The Division Bench of the High Court, after referring to the evidence on that aspect, has observed thus:

> "We do not find any unexplained time gap as held by the Sessions Judge. Moreover, the prosecutrix and her mother had not given the time when the prosecutrix reached the house of her aunt Kaushlya Devi. It is only Kaushlya Devi who has stated that the prosecutrix had come to her house at about 11 P.M. when she was asleep. In the absence of her further statement that she has noticed the time as 11 P.M. in her wrist watch or in any other watch or clock, the possibility cannot be ruled out that she gave the time only as per her estimate and the margin of error might be from half an hour to one hour."

After referring to certain other details of the occurrence the Sessions Judge expressed her inability to believe the story narrated by Shishna Devi and then observed that "there are a few important missing links in the prosecution case and no attempt has been made by the investigating officer to collect those links." As an example the trial judge pointed out that "none from the family of the accused or the locality has been examined in order to prove the presence of the prosecutrix in the house of the accused on the evening of the occurrence for watching the television." But the High Court totally disagreed with the said reasoning and stated: "It is too much to expect that any member of the family of the respondent or from the houses in the neighbourhood would appear as witness in support of the statement to the prosecutrix that she was present in the house of the respondent for watching TV". The learned Judges pointed out that prosecutrix is the daughter of a poor daily-wage labourer, whereas the accused is the son of a proprietor of a flour mill and landlord.

We have no doubt that the Sessions Judge had reached an erroneous conclusion by approaching the question from a wrong angle. The evidence of the adolescent girl - the victim of rape, as duly corroborated by the testimony of her mother and aunt, and adequately confirmed by the medical evidence, had conclusively established that she was subjected to ravishment by the accused and none else. The reasons adverted to by the High Court are far sturdier and stronger than those suggested by the Sessions Judge to rely on. The Division Bench of the High Court has thus rightly reversed the order of acquittal and convicted the accused under Section 376 of the IPC.

While considering the sentence we have to bear in mind that the offence was committed after the enforcement of Criminal Law Amendment Act (CLAA) No.43 of 1983. So the provision prescribing more rigorous sentence must apply if the offence falls within the purview of sub-section (1) of Section 376, and then he "shall be punished with imprisonment of either description for a term which shall not be less than seven years". If the offence falls under sub-section (2)(f) (commits rape on an woman when she is under 12 years of age) the offender is liable to be "punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine."

The question of the age of Shishna Devi is, therefore, important in this area. If she was below the age of 12, on the date of occurrence the minimum sentence would be rigorous imprisonment for 10 years. PW-14 Dr. J.S. Kanwar has fixed up the age of PW-2 Shishna Devi as 10 years on the date of her examination. This was testified to by the doctor on the strength of clinical examination conducted by him. But the doctor did not conduct either ossification test or any other pathological tests to reach at least the approximate age of the victim. So his assessment regarding age is based on

fragile premises.

According to Ext.PH (School Certificate of Shishna Devi) her date of birth is 11-11-1978, which means that on the date of occurrence she was below 11 years of age. But Ext. PH lost its credibility when Ext.PO (the Certificate issued by the Panchayat) was produced in which the date of birth of PW-2 is shown as 24-11-1978. But the evidence of PW-2's mother Kunta Devi (PW-3) shows that Shishna Devi was 12-13 years old. The Sessions Judge found her age as put forth by Kunta Devi, the mother of PW-2, and the High Court did not interfere with that. Therefore, we have to follow the said finding on fact. Even then, the sentence prescribed under sub-section (1) of Section 376 of the IPC has stipulated a minimum limit that it "shall not be less than 7 years".

However, learned counsel for the accused made a serious endeavour to bring the case within the proviso to Section 376 IPC which reads thus:

> "Provided that 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 seven years."

As pointed out earlier, the Division Bench of the High Court reduced the sentence from the minimum limit, on a premise that "in view of the fact that the occurrence is of 21.5.1989 when he was 25 years of age and he might have settled in life".

In order to support the said reasoning, learned counsel for the accused relied on the following observations of a two Judge Bench of this Court in the State of Punjab vs. Gurmit Singh and ors. {1996 (2) SCC 384}: "So far as the sentence is concerned, the court has to strike a just balance. 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 acquitted by the trial court on 1.6.1985, more than a decade ago. All the respondents as well as the 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 the respondents." But recently in the State of Karnataka vs. Krishnappa {JT 2000 (3) SC 516} a three Judge Bench of this Court, after referring to the above decision, restored the sentence of imprisonment for 10 years fixed by the trial court for the offence under Section 376 of the IPC. The victim in that case was aged 7-8 years. The High Court in that case had reduced the sentence of imprisonment to 4 years. Dr. A.S. Anand, CJI, who authored the judgment of the Bench, had stated thus:

> "The High Court justified the reduction of sentence on the ground that the accused-respondent was `unsophisticated and illiterate citizen belonging to a weaker section of the society'; that he was `a chronic addict to drinking' and had committed rape on the girl while in a state of `intoxication' and that his family comprising of `an old mother, wife and children' were dependent upon him. These factors, in our opinion, did not justify recourse to the proviso to Section 376(2) IPC to impose a sentence less than the prescribed minimum. These reasons are neither special nor

> adequate. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. Socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. 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."

This Court in the said decision noted that "there are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum to the respondent."

As Parliament has disfavoured the sentence to plummet below the minimum limit prescribed Parliament used the expression "shall not be less than" which is peremptory in tone. The court has, normally, no discretion even to award a sentence less than the said minimum. Nonetheless Parliament was not oblivious of certain very exceptional situations and hence to meet such extremely rare contingencies it made a departure from the said strict rule by conferring a discretion on the court subject to two conditions. One is that there should be "adequate and special reasons", and the other is that such reasons should be mentioned in the judgment. The expression "adequate and special reasons" indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons. What the Division Bench of the High Court mentioned (i.e. occurrence took place 10 years ago and the accused might have settled in life) are not special to the accused in this case or to the situations in this case. Such reasons can be noticed in many other cases and hence they cannot be regarded as special reasons. No catalogue can be prescribed for adequacy of reasons nor instances can be cited regarding special reasons, as they may differ from case to case.

As the reasons advanced by the Division Bench of the High Court could not be supported as adequate and special reasons learned counsel for the accused projected an alternative profile in order to support his contention that there are adequate and special reasons. He submitted the following: Shishna Devi(PW2) has since been married to another person and she is now mother of children and is well-settled in life. The accused was aged 23 when the offence was committed and now he is 34, but he remains unmarried. He says that on two occasions his marriage had reached the stage of engagement but both had to be dropped off before reaching the stage of marriage due to the social stigma and disrepute which surrounded him. These are the reasons which he advanced for extending the benefit of the proviso.

Those circumstances pleaded by him are not special reasons for tiding over the legislative mandate for imposing the minimum sentence. We, therefore, enhance the sentence for the offence under Section 376 I.P.C. to imprisonment for 7 years.

The long time lag which elapsed subsequent to the date of offence and the fact that the prosecutrix got married and is well settled in life and that she is now mother of children - all these things which happened during the intervening period, may be factors for consideration by the executive or constitutional authorities if they have to decide whether remission of the sentence can be allowed to the accused. We make it clear that we have imposed the enhanced sentence on him without prejudice to any motion he may make for such remission of the sentence before the authorities concerned.