Sunil Kumar @ Sudhir Kumar vs The State Of Uttar Pradesh Through ... on 25 May, 2021

Author: Dinesh Maheshwari

Bench: Aniruddha Bose, Dinesh Maheshwari

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 526 OF 2021
(Arising from SLP (Crl.) No.3549 of 2018)

SUNIL KUMAR @ SUDHIR KUMAR & ANR. ….. APPELLANT(S)

VERSUS

THE STATE OF UTTAR PRADESH …. RESPONDENT(S)

JUDGEMENT

Leave granted.

2. In view of the order dated 13.04.2018 passed by this Court while granting permission to file Special Leave Petition and issuing notice, the scope of this appeal is restricted to the question of sentence; and the appellants herein, after their conviction of offences under Sections 363, 366 and 376(1) of the Indian Penal Code, 1860 ('IPC'), have already undergone 13 years and 2 months of imprisonment. In the given circumstances, we have heard learned counsel for the parties finally at this stage itself.

2.1.

Even the short question involved in this matter carries the peculiarities of its own, as noticed infra.

3. As regards relevant background aspects, suffice it to notice that on 03.02.2008, Case Crime No. 44 of 2008 for offences under Sections 363 and 366 Indian Penal Code, 1860 ('IPC') came to be registered at Police Station, T.P. Nagar, Meerut on the basis of a written complaint that the complainant's 13-year-old daughter, who had gone to school on 15.01.2008, had not returned; and

after a lot of efforts, the complainant came to know that the accused-appellant No. 2 Faimuddin @ Feru @ Sonu had enticed his daughter. In the course of investigation, the victim girl was recovered and, ultimately, the charge-sheet was filed against the appellants for offences under Sections 363, 366 and 376 IPC. They were tried in Sessions Trial No. 575 of 2008 wherein, the Court of Additional District and Sessions Judge, Fast Track Court No. 5, Meerut, in its judgement and order dated 12.09.2008, convicted them of offences under Sections 363, 366 and 376(1) IPC.

4. After having recorded conviction as aforesaid, the Trial Court sentenced the appellants to several punishments in the following manner:

> rigorous imprisonment for a term of 5 years with fine of Rs. 2,000/- and in default, further imprisonment for 6 months for the offence under Section 363 IPC; rigorous imprisonment for a term of 7 years with fine of Rs.

3,000/- and in default, further imprisonment for 1 year for the offence under Section 366 IPC; and rigorous imprisonment for a term of 10 years with fine of Rs. 5,000/- and in default, further imprisonment for 1½ years for the offence under Section 376(1) IPC. However, the Trial Court did not specify as to whether the punishments of imprisonment would run concurrently or consecutively; and if they were intended to run consecutively, the Trial Court did not specify the order in which one punishment of imprisonment was to commence after expiration of the other.

5. As against the judgment and order of the Trial Court, only the appellant No. 1 Sunil Kumar @ Sudhir Kumar preferred an appeal before the High Court of Judicature at Allahabad, being Criminal Appeal No. 7399 of 2008. However, learned counsel for the appellant before the High Court confined his arguments only on the point of sentence and did not press on the point of conviction. Thus, the conviction recorded by the Trial Court attained finality, for the appellant No. 2 having not filed the appeal and for the appellant No. 1, even after filing the appeal, having not challenged the same. Accordingly, the High Court, examined only the question of sentence qua the appellant No. 1 and, in its impugned judgement and order dated 21.02.2018, while holding that the default stipulations were rather disproportionate, proceeded to modify the order of sentencing only to the extent that in the event of default in payment of fine, the accused-appellant (i.e., the appellant No. 1) shall undergo additional imprisonment for the terms of 5 months, 3 months and 1 month for the offences under Sections 376(1), 366 and 363 IPC respectively. However, the High Court, even after taking note of the fact that the accused-appellant had already undergone 10 years of imprisonment, did not consider that the Trial Court had neither provided for concurrent running of sentences nor provided the order of running of sentences, if they were to run consecutively. Interestingly, while the Trial Court sentenced the appellants for offences under Sections 363, 366 and 376(1) in that order, the High Court provided for modification of default stipulations in converse order i.e., for offences under Sections 376(1), 366 and 363 IPC respectively.

6. For the reason that the decisions aforesaid were silent on the point of concurrent or consecutive running of sentences, the Jail Superintendent, District Jail, Meerut, while issuing certificates of confinement on 14.03.2018, stated that the accused-appellants had undergone 10 years and 1 month of imprisonment but, there being no mention in the sentencing order about concurrent running of

sentences, they were serving 22 years of imprisonment. Faced with such a predicament, the accused-appellants have approached this Court.

7. While confining his arguments to the question of sentence, learned counsel for the appellants Mr. Amit Pai has industriously put forward the submissions with reference to Section 31 of the Code of Criminal Procedure, 1973 ('CrPC') and a good number of the decisions of this Court.

7.1. The learned counsel has contended, while relying on the decisions in Nagaraja Rao v. Central Bureau of Investigation: (2015) 4 SCC 302 and Gagan Kumar v. State of Punjab: (2019) 5 SCC 154, that it is obligatory for the Court awarding punishments to specify whether they shall be running concurrently or consecutively; and the omission on the part of the Trial Court and the High Court, to state the requisite specifications, cannot be allowed to operate detrimental to the interests of the accused-appellants. The learned counsel has contended that though as per the mandate of Section 31 CrPC, unless specified to run concurrently, the sentences do run consecutively but, for that purpose, the Court is required to direct the order in which they would run; and no such direction having been given by the Trial Court or by the High Court, it cannot be said that the Courts were consciously providing for consecutive running of sentences. Further, with reference to the decision in O.M. Cherian alias Thankachan v. State of Kerala & Ors.: (2015) 2 SCC 501, the learned counsel would urge that it is not the normal rule that multiple sentences are to run consecutively.

7.2. The learned counsel Mr. Pai has also attempted to adopt another line of argument that concurrent or consecutive running of sentences is also to be governed by 'single transaction' principle, as discernible from a combined reading of Sections 31(1) and 220(1) CrPC. In this regard, apart from the aforesaid decisions in Nagaraja Rao and Gagan Kumar, the learned counsel has also relied upon the decisions in Mohan Baitha & Ors. v. State of Bihar & Anr.: (2001) 4 SCC 350; Mohd. Akhtar Hussain alias Ibrahim Ahmed Bhatti v. Assistant Collector of Customs (Prevention), Ahmedabad & Anr.: (1988) 4 SCC 183; and Manoj alias Panju v. State of Haryana: (2014) 2 SCC 153 and has submitted that looking to the nature of accusation, there was no reason for the Courts to direct consecutive running of sentences in the present case.

7.3. Further, the learned counsel for the appellants has referred to the decisions in State of Punjab v. Gurmit Singh & Ors.: (1996) 2 SCC 384 and State of Madhya Pradesh v. Anoop Singh: (2015) 7 SCC 773 to submit that those too were the cases involving offences under Sections 363, 366 and 376 with victim being a minor; and therein, this Court has awarded the sentences running concurrently.

7.4. The learned counsel has also argued that though the appellant No. 2 did not prefer appeal against the judgment and order of the Trial Court, this Court permitted him to file SLP by the order dated 13.04.2018; and, therefore, benefit of reduction of default sentence, as ordered by the High Court, deserves to be extended to the appellant No. 2 too. 7.5. The learned counsel Mr. Pai, even while frankly pointing out the observations of the Constitution Bench in Muthuramalingam & Ors. v. State: (2016) 8 SCC 313 (paragraph 28), to the effect that sub-section (2) of Section 31 has no application to a case tried by the Court of Sessions nor sub-section (2) forbids a direction for consecutive running of sentences awardable by the Court of Sessions, has made a fervent appeal that the appellants have already undergone over 13 years of imprisonment; and if ordained to serve for a

total term of 22 years by consecutive running of sentences, it would be highly disproportionate to the actual punishment they need to suffer in this case.

8. On the other hand, the learned AAG Mr. Vinod Diwakar has, firmly as also fairly, put forward the views on behalf of the respondent-State in opposition to the contentions aforesaid.

8.1. The learned AAG Mr. Diwakar would submit that Section 31 CrPC vests a discretion in the Trial Court to direct whether or not the sentences would run concurrently when the accused is convicted at one trial of two or more offences but, in the present case, after noticing the gravity and nature of offences i.e., kidnapping and rape of a 13-year-old girl, the Trial Court has exercised its discretion and did not mention that the sentences would be running concurrently; and, therefore, ipso facto, they are to run consecutively.

8.2. The learned AAG has also submitted that the principles related with commission of offences in a single transaction do not lead to the proposition that different sentences in relation to multiple offences shall invariably be running concurrently; and has referred to the enunciations in O.M. Cherian (supra). The learned AAG has further referred to the Constitution Bench decision in the case of Muthuramalingam (supra) to submit that except life imprisonments, the other term sentences awarded by the Court for several offences do run consecutively, unless directed otherwise.

8.3. The learned AAG for the State would submit that concurrent running of sentences, as provided in any particular case, relates to the facts and circumstances pertaining to that case and the appellants cannot claim any parity for concurrent running of sentences with reference to any other decided case, even if relating to the offences of similar nature. The learned AAG would argue that in the present case, looking to the nature and gravity of offences, the Trial Court has exercised its discretion in not directing concurrent running of sentences, which only means that the sentences are to run consecutively; and that an omission on the part of the Trial Court in not specifying the order of running cannot mean that the sentences are to run concurrently.

9. We have given thoughtful consideration to the rival submissions and have examined the record of the case with reference to the law applicable.

10. The contentions urged in this matter essentially revolve around the provisions contained in Section 31(1) CrPC. The contours of these provisions have been succinctly delineated and explained by this Court in the case of O.M. Cherian (supra) in the following terms: -

> “20. Under Section 31 CrPC it is left to the full discretion of the court to order the sentences to run concurrently in case of conviction for two or more offences. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. By and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for concurrent running of sentences, favouring the benefit to be given to the accused. Whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the

case. The discretion has to be exercised along the judicial lines and not mechanically.

21. Accordingly, we answer the reference by holding that Section 31 CrPC leaves full discretion with the court to order sentences for two or more offences at one trial to run concurrently, having regard to the nature of offences and attendant aggravating or mitigating circumstances. We do not find any reason to hold that normal rule is to order the sentence to be consecutive and exception is to make the sentences concurrent. Of course, if the court does not order the sentence to be concurrent, one sentence may run after the other, in such order as the court may direct. We also do not find any conflict in the earlier judgment in Mohd. Akhtar Hussain and Section 31 CrPC." 10.1. In Muthuramalingam (supra), the basic question before the Constitution Bench was as to whether consecutive life sentences could be awarded to a convict on being found guilty of a series of murders, for which, he had been tried in a single trial. In the course of determination of this question, the Constitution Bench dealt with several dimensions of sentencing, particularly those relating to multiple sentences and observed, inter alia, that,-

"23.....So interpreted Section 31(1) CrPC must mean that sentences awarded by the court for several offences committed by the prisoner shall run consecutively (unless the court directs otherwise) except where such sentences include imprisonment for life which can and must run concurrently...." 10.2. Thus, it is beyond a shadow of doubt that Section 31(1) CrPC vests complete discretion with the Court to order the sentences for two or more offences at one trial to run concurrently having regard to the nature of offences and the surrounding factors. Even though it cannot be said that consecutive running is the normal rule but, it is also not laid down that multiple sentences must run concurrently. There cannot be any straitjacket approach in the matter of exercise of such discretion by the Court; but this discretion has to be judiciously exercised with reference to the nature of the offence/s committed and the facts and circumstances of the case. However, if the sentences (other than life imprisonment) are not provided to run concurrently, one would run after the other, in such order as the Court may direct.

11. For what has been provided in Section 31(1) CrPC read with the expositions of this Court, it follows that the Court of first instance is under legal obligation while awarding multiple sentences to specify in clear terms as to whether they would run concurrently or consecutively. In the case of Nagaraja Rao (supra), this Court expounded on this legal obligation upon the Court of first instance in the following terms:-

"11. The expressions "concurrently" and "consecutively" mentioned in the Code are of immense significance while awarding punishment to the accused once he is found guilty of any offence punishable under IPC or/and of an offence punishable under any other Special Act arising out of one trial or more. It is for the reason that award of former enure to the benefit of the accused whereas award of latter is detrimental to the accused's interest. It is therefore, legally obligatory upon the court of first instance while awarding sentence to specify in clear terms in the order of conviction as to whether sentences awarded to the accused would run "concurrently" or they

would run "consecutively"."

12. As noticed, if the Court of first instance does not specify the concurrent running of sentences, the inference, primarily, is that the Court intended such sentences to run consecutively, though, as aforesaid, the Court of first instance ought not to leave this matter for deduction at the later stage. Moreover, if the Court of first instance is intending consecutive running of sentences, there is yet another obligation on it to state the order (i.e., the sequence) in which they are to be executed. The disturbing part of the matter herein is that not only the Trial Court omitted to state the requisite specifications, even the High Court missed out such flaws in the order of the Trial Court.

13. Even when we find the aforementioned shortcomings in the orders passed by the Trial Court as also by the High Court, the question is as to whether the sentences awarded to the appellants could be considered as running concurrently? As noticed, the omission to state whether the sentences awarded to the accused would run concurrently or would run consecutively essentially operates against the accused because, unless stated so by the Court, multiple sentences run consecutively, as per the plain language of Section 31(1) CrPC read with the expositions in Muthuramalingam and O.M. Cherian (supra). The other omission to state the order of consecutive running cannot ipso facto lead to concurrent running of sentences.

14. Faced with the position that the stated omissions will not, by themselves, provide a room for concurrent running of sentences, learned counsel for the appellants has endeavoured to invoke the 'single transaction' principle. In our view, the said principle is essentially referable to Section 220 CrPC, which provides that if more offences than one are committed in one series of acts so connected together as to form the same transaction, then the accused may be charged with and tried at one trial for every such offence. In a given case, after such trial for multiple offences, if the accused is convicted and awarded different punishments, concurrent running thereof may be provided depending on the facts and the relevant surrounding factors. We are afraid, the principle related with 'single transaction' cannot be imported for dealing with the question at hand.

14.1. In the case of Mohan Baitha (supra), this Court observed that the expression 'same transaction', from its very nature, is incapable of an exact definition and it is not possible to enunciate any comprehensive formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. The question involved in that case did not relate to sentence but to the inquiry and trial of different offences pertaining to Sections 304-B, 498-A, 120-B and 406 IPC and territorial jurisdiction of the Magistrate in Bihar when the alleged incident constituting one of the offences, i.e., under Section 304-B IPC, had taken place in the State of Uttar Pradesh. Of course, in the case of Mohd. Akhtar Hussain (supra), this Court indicated that if a transaction constitutes two offences under two enactments, generally it is wrong to have consecutive sentences but this Court hastened to observe that such a rule shall have no application if the transaction relating to the offences is not the same or the facts concerning the two offences are quite different. Significantly, in that case, consecutive running of sentences awarded to accused-appellant, in two different cases pertaining to the Gold (Control) Act, 1968 and the Customs Act, 1962, was upheld by this Court with the finding that the two offences for which the appellant was prosecuted were 'quite distinct and different'. The only modification ordered by this Court was

concerning the term of imprisonment for the latter conviction while disapproving its enhancement from 4 years to 7 years by the High Court after noticing that he was already sentenced to imprisonment for a term of 7 years in the first offence. The trial and conviction in the case of Manoj alias Panju (supra) had been for offence under Section 307 IPC as also under Sections 25 and 27 of the Arms Act. In the case of Nagaraja Rao (supra), the trial and conviction had been of offences under Section 381 IPC and Section 52 of the Post Office Act, 1898. In the case of Gagan Kumar (supra), offences were under Sections 279 and 304-A IPC. These decisions, essentially proceeding on their own facts, do not make out a case for interference in favour of the appellants.

15. The punishments awarded by this Court in the cases of Gurmit Singh and Anoop Singh (supra), relate to the individual facts and circumstances and cannot be adopted as the precedents for the purpose of particular quantum of sentences and their concurrent running. Significantly, in both the said cases, the conviction was recorded by this Court after setting aside the impugned orders of acquittal. The orders passed by this Court, for striking a just balance in the matter of sentencing after reversing the acquittal, cannot be applied to the present case where conviction recorded by the Court of first instance was not even challenged, and has attained finality.

16. For what has been discussed hereinabove, we are not inclined to accept the principal part of the submissions of learned counsel for the Appellants. However, the other part of his submissions, that requiring the appellants to serve a total term of 22 years in prison would be highly disproportionate to the actual punishment they need to suffer in this case, cannot be brushed aside as altogether unworthy of consideration.

17. We have taken note of the observations of the Constitution Bench in Muthuramalingam (supra), which were made in the context of a previous decision of this Court, where the eventuality of consecutive running of life sentences was obviated with reference to the proviso to sub-section (2) of Section 31. The Constitution Bench though endorsed the view that consecutive life sentences cannot be awarded but observed that the proviso to sub-section (2) of Section 31 CrPC cannot be relied upon to support this conclusion and also observed that sub-section (2) of Section 31 CrPC has no application to a case tried by the Court of Sessions nor sub-section (2) forbids a direction for consecutive running of sentences awardable by the Court of Sessions.

17.1. Even when sub-section (2) of Section 31 CrPC is not directly applicable, some of the relevant features of the present case are that the offences in question were committed in the year 2008 i.e, before amendment of IPC by the Amending Act 13 of 2013; the appellants have continuously served about 13 years and 2 months of imprisonment; and nothing adverse in regard to their conduct while serving the sentences has been placed on record. In the given set of circumstances, we have pondered over the question as to what ought to be the order for a just balance on the requirements of punishment on one hand and reasonable release period for the appellants on the other, while keeping in view the overall scheme of awarding of punishments and execution thereof, including the ancillary aspects referable to Sections 433 and 433A CrPC as also Section 55 IPC whereunder, serving of a term of 14 years even in the sentence of imprisonment for life is the bottom line (subject to the exercise of powers of commuting by the appropriate Government in accordance with other applicable principles). After anxious consideration of all the relevant factors, we are of the view that

the requirements of complete justice to the cause before us could adequately be met by providing that the maximum period of imprisonment to be served by the appellants shall be 14 years and not beyond.

18. However, the submission for extending the benefit of modification of default stipulations qua the appellant no.2 carries the shortcoming that the said appellant did not prefer appeal against the judgment and order of the Trial Court. This is coupled with the fact that in the root cause of this matter, the initial accusation of enticing the victim was made against the appellant No.2. In view of the overall circumstances and the principal subject matter of this appeal, we find no reason to re-open the issue which was not taken up by the appellant No.2 at the relevant stage.

19. In view of the above, in exercise of powers under Article 142 of the Constitution of India, we provide for modification of the punishment awarded to the appellants in the manner that the maximum period of imprisonment to be served by them in relation to offences in question shall be 14 years and not beyond. It goes without saying that this order of modification is passed only in the peculiar facts and circumstances of this case.

19.1. However, the requirement of payment of fine and the default stipulations, as applicable to the appellant No.1 in terms of the order of the High Court and to the appellant No.2 in terms of the order of the Trial Court, shall remain intact. Learned counsel for the appellants submits that as per his instructions, the appellant No.1 has deposited the fine amount. The submission is taken on record. However, it is made clear that in default in payment of fine, the defaulter-appellant shall undergo respective default sentences consecutively and in the order they have been imposed, for offences under Sections 363, 366, and 376(1) IPC.

20. The appeal is partly allowed, as aforesaid.

21. While closing on the matter, we deem it appropriate to reiterate what was expounded in the case of Nagaraja Rao (supra), that it is legally obligatory upon the Court of first instance, while awarding multiple punishments of imprisonment, to specify in clear terms as to whether the sentences would run concurrently or consecutively. It needs hardly an emphasis that any omission to carry out this obligation by the Court of first instance causes unnecessary and avoidable prejudice to the parties, be it the accused or be it the prosecution.

……J. (DINESH MAHESHWARI) ……J. (ANIRUDDHA BOSE) NEW DELHI MAY 25, 2021