REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(S). 230 OF 2013

SATISH KUMAR JAYANTI LAL DABGAR .....APPELLANT(S)

VERSUS

STATE OF GUJARAT .....RESPONDENT(S)

J U D G M E N T

A.K. SIKRI, J.

Though, this Court vide order dated 18.09.2012 appointed Mr. Parmanand Katara as Amicus Curiae, he has not appeared. This is an unfortunate situation and we do not appreciate the same. However, on our request, Mr. Mohan Pandey, learned counsel who was present in the Court pertaining to other case agreed to assist the Court. He was given time to go through and prepare the matter. Thereafter, the matter was heard when he was fully ready with the same.

2) This appeal arises out of the judgment dated 04.04.2011 passed by the High Court of Gujarat in Criminal Appeal No.2158/2005, whereby the High Court has partly allowed the said appeal. The appellant herein was put on trial and convicted for offences under Sections 363, 366 as well as 376 of the Indian Penal Code (for short the 'IPC') and was sentenced to undergo rigorous imprisonment for committing the aforesaid offences as under:

(a) For committing the offence punishable under Section 363 IPC, the trial court sentenced him to undergo imprisonment for a period of three years and also imposed a fine of Rs.2,000/- with the clause that in default of payment of fine, the appellant will have to undergo simple imprisonment for a period of one month.

(b) *Qua* the conviction recorded for the offence punishable under Section 366 of the IPC, sentenced imposed by the trial court was five years imprisonment with fine of Rs.3,000/- and in default of payment of fine, sentenced to undergo simple imprisonment for a period of two months.

(c) For committing the offence punishable under Section 376 of the IPC, the appellant was imposed rigorous imprisonment for a period of seven years and also fine of Rs.45,000/- with the stipulation that in the event, appellant defaults in paying

the fine, he would have to undergo simple imprisonment for a period of one year.

The aforesaid amount of Rs.45,000/-, if payable by the appellant as fine, was ordered to be paid to the victim as a compensation. All the sentences were to run concurrently.

3) In the appeal preferred by the appellant against the aforesaid conviction, the High Court has affirmed the conviction, as accorded by the trial court. However, at the same time, it has modified the sentence by reducing it to rigorous imprisonment for a period of 4½ years instead of 7 years for the offence punishable under Section 376 of the IPC. With this solitary modification resulting into partial allowing of the appeal, rest of the judgment and sentence dated 15.09.2005 passed by the learned Additional Sessions Judge, Sabarkantha, 4th Fast Track Court, Modasa, Gujarat has been affirmed.

4) The appellant was implicated and charged under Sections 363, 366 and 376 of the IPC under the following circumstances.

On 01.09.2003 at about 17.15 hours when wife of the complainant returned from the market purchasing vegetable, she could not find her daughter at home. On inquiring from one Hansaben, she came to know that the knowledge that the appellant had come to their house

and had a talk with their daughter. Thereafter, the appellant went towards the market and after sometime, prosecutrix also went towards the market. The complainant inquired from the shop of the uncle of the appellant and he was told that the appellant and the prosecutrix had gone towards Modasa Bus Stand. The complaint rushed to the Modasa Bus Stand, but could not find the appellant or the prosecutrix there. It is also the case of the prosecution that son of the uncle of the appellant told that he had seen the appellant and the prosecutrix - Anita at the Modasa Bus Stand some time ago. Since the prosecutrix could not be traced, a complaint to the said effect was registered by the complainant on 05.09.2003 with Meghraj Police Station. Two days after the said complaint, the appellant surrendered himself before the Police on 07.09.2003. Thereafter, necessary panchnama came to be drawn and statements of the appellant and prosecutrix were recorded. They were also sent for medical examination. Clothes of the appellant and prosecutrix were seized in the presence of panchas and were sent for analysis to FSL, Ahmedabad. The investigation revealed sufficient evidence against the appellant. This led to his formal arrest on 30.11.2003. Thereafter, as the case was exclusively triable by the Court of Sessions, the case was committed to Sessions Court, Himmatnagar.

5) After framing of the charge, the trial proceeded. The prosecution examined as many as 11 witnesses to prove the charges. The particulars of these witnesses are as under:

No.	Ex.	Name of witnesses	
1	8	Rasikbhai Hirabhai Dabagar	complainant/ supporter
2	10	Daughter of Rasikbhai Hirabhai Dabagar	Victim/supporter
3	15	Punamchand Laljibhai Dabagar	Witness/supporter
4	16	Rakesh Kumar Punamchand	Witness/supporter
5	17	Hansaben Punamchand Dabagar	Witness/supporter
6	18	Mulljibhai Dayashankar Upadhayaya	IO, who made chargesheet
7	25	Chandanben Rasiklal Dabgar	witness/supporter
8	27	Bhikhabhai Manbhai Parmar	witness/supporter
9	28	Kanubhai Jaychandbhai Chaudharay	Main IO
10	33	Dr. Rajkamal Shri Adhyasharan	Medical Officer
11	39	Bharat Kumar Babarbhai Patel	Employee of Nagar Palika

6) In addition, following documents were produced and exhibited through the witnesses:

1 Original Complaint by Ex. 9.
2 Panchnama of scene of offence by Ex.11.
3 Panchnama of clothes of victim and accused seized by Ex.12.
4 Receipt of FSL for having received the Muddamal by Ex.19.
5 Forwarding letter of FSL regarding having sent the FSL report by Ex.20

6	FSL report by Ex.21.
7	Report showing the results of serological analysis by Ex.22.
8	Birth Certificate of victim by Ex.26.
9	Muddamal dispatch note by Ex.29.
10	Yadi made by police for making medical examination of accused by Ex.34.
11	Medical certificate of physical examination of Victim by Ex.35.
12	Medical certificate of physical examination of accused by Ex.36.
13	Abstract of Birth Registration Register of Nagarpalika by Ex.40.

7) After conclusion of the prosecution evidence, the statement of the accused was recorded under Section 313 of the Code of Criminal Procedure. In his statement, the appellant stated that he was innocent. His defence was that he and prosecutrix were in love with each other and had tied nuptial knot with free consent of the victim. Marriage between them was solemnized as per Hindu rites on 09.03.2003 at Unza which was got registered as well. The appellant produced Memorandum of Marriage as Ex.43 depicting registration of marriage, issued by the Marriage Registrar, Unza. The appellant, thus, maintained that a false case was filed against him. He, however, did not examine any defence witness.

8) After hearing the arguments, the learned trial court arrived at the conclusion that charges against the appellant under Sections 363, 366 and 376 IPC were fully proved beyond any reasonable doubt. It was primarily on the ground that the prosecutrix was less than 16

years of age on the date of the incident i.e. 01.09.2003 and, therefore, there was no question of giving any consent by her and the alleged consent was of no value. A perusal of the judgment of the learned Additional Sessions Judge shows that according to him, following points had arisen for consideration:

> 1. Whether the Prosecution proves beyond doubt that the victim of this case was minor on the day of incident dated 01.09.2003?
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> 2. Whether the Prosecution proves beyond doubt that at about quarter past five pm on 01.09.2003, the accused had kidnapped minor daughter of Rasikbhai Hirabhai from his guardianship without any kind of permission from Megharaj and thereby he has committed the offence punishable u/s 363 of IPC?
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> 3. Whether the Prosecution proves beyond doubt that at aforesaid time and date, despite knowing that she is minor, the accused with intention to marry her and to commit external marital sexual intercourse, had enticed and cajoled and kidnapped her from lawful guardianship and taken her at some other place and thereby he has committed the offence punishable u/s 366 of IPC?
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> 4. Whether the Prosecution proves beyond doubt that at aforesaid time and date kidnapping the victim minor daughter of complainant from his lawful guardianship that accused had kidnapped and taken her at different places and despite he is a married male person, had committed rape sexual intercourse with her without her desire and consent and thereby he has committed the offence punishable u/s 376 of IPC?
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> 5. What order?

9) The questions formulated at Serial Nos.1 to 4 above were decided in the affirmative. The discussion in the judgment reveals that it was an admitted case that the victim and the accused were from the same community and they both had gone out of station together. It was also established on record that there was physical relationship between them at different places and at different times and marriage was also performed on 09.03.2003 at Unza which was duly registered in the Office of Marriage Registrar. However, the primary defence of the appellant was that the prosecutrix was major; she accompanied the appellant willingly and entered into physical relationship as well as matrimonial alliance out of her free will, desire and consent. Therefore, the most important question before the trial court, on which the fate of the case hinged, was the age of the victim from which it could be discerned as to whether she was major on the date of the incident or not.

10) In order to prove that the victim was below 16 years at the relevant time, the prosecution had produced xerox copy of school certificate where she had studied which was marked as 6/4. However, the learned Additional Sessions Judge, for various reasons recorded in the impugned judgment, opined that this xerox copy was not proved in accordance with law and, therefore, could not be taken into

consideration to determine the age of the prosecutrix. Since, no reliance is place thereupon by the prosecution thereafter in the High Court and before us as well, it is not necessary to delve into the reasons which had persuaded the trial court to take the aforesaid view in respect of this particular document.

11) Notwithstanding the fact that the aforesaid document was discarded, the trial court accepted the version of the prosecution by arriving at the finding that the prosecutrix was below the age of 16 years on the date of occurrence. This finding is based on the deposition of Chandanben, mother of the victim coupled with Birth Certificate (Ex.26) issued by Dholka, Nagar Palika where the victim was born. In her deposition, Chandanben had stated that the prosecutrix was born in a hospital in Dholka, Nagar Palika and Ex.26 was produced which was issued by Dholka, Nagar Palika. To prove the authenticity of this certificate, an employee from Dholka, Nagar Palika was summoned on the application made by the prosecution. One Mr. Bharat Kumar Babarbhai Patel appeared with the requisite records. He not only testified to the effect that Ex.26 was issued by Dholka, Nagar Palika, but this evidence was further corroborated by producing register of birth and death maintained by the said Nagar Palika which contained entry of the birth of the prosecutrix made at Serial Nos.1345 on Page No.91 in the year 1988. Xerox copy of this document was taken on

record as Ex.40. Believing in the authenticity of these documents, the trial court concluded that as per Ex.40 read with Ex.26, the date of birth of prosecutrix was 28.09.1988 and entry to this effect was made in the Register on 01.10.1988 which clearly evinced that the prosecutrix was less than 16 years of age (in fact even less than 15 years) on 01.09.1993 when she was taken away by the appellant. Having regard to her age, the trial court concluded that it was a case of kidnapping as her consent was immaterial inasmuch as being a minor she was not capable of giving any consent at that age. Likewise, since sexual intercourse had been virtually admitted and proved as well by medical evidence, the same would clearly amount to rape. Apart from the admission of the accused himself, the factum of sexual intercourse was proved by medical examination and Dr. Raj Kamal who had examined the victim as well as accused, had deposed to this effect.

12) Taking into account the aforesaid evidence appearing on record, the High Court upheld the conviction recorded by the trial court, and rightly so, as we do not find any reason to deviate therefrom. In fact, the learned counsel for the appellant could not make any argument which could dent the case of the prosecution even a bit. In the face of aforesaid material staring at the appellant, learned counsel for the appellant was candid in his submission that he would press only for

reduction of sentence. Otherwise also, it is a matter of record that this was the only plea raised by the counsel for the appellant even before the High Court. The learned Amicus Curiae, therefore, drew our attention to para 12 of the impugned judgment wherein it is noted that the appellant was newly married (which means just before April, 2011 when the judgment of the High Court was delivered). It was also pleaded that he was a poor man and the only bread earner in his family. Another extenuating circumstance which was sought to be projected was that even though the prosecutrix was below 16 years of age at the time of incident, the entire episode was the result of love affair between the appellant and the prosecutrix and every act between them was consensual. It was also pointed out that even the prosecutrix was married and had one child and, therefore, was happily settled in her matrimonial home. On the basis of these circumstances, the plea was made that the appellant should be accorded sympathetic treatment by reducing the sentence imposed upon him.

13) Having regard to the aforesaid plea, we are called upon to consider the issue of sentence only in the present appeal. The extenuating and mitigating circumstances narrated by the learned Amicus Curiae have been duly taken note of by the High Court as well. In fact, going by these very circumstances projected by the defence, the High Court

reduced the sentence of seven years rigorous imprisonment imposed under Section 376 of the IPC to 4½ years. We feel that appellant is not entitled to any further mercy.

14) First thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section 375 of the IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows:

> "375. Rape—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—
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> xx xx xx
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> **Sixthly -** With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

15) The Legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such

a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.

16) Once we put the things in right perspective in the manner stated above, we have to treat it a case where the appellant has committed rape of a minor girl which is regarded as heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind Protection of Children from Sexual Offences Act.

17) The purpose and justification behind sentencing is not only retribution, incapacitation, rehabilitation but deterrence as well. Certain aspects

of sentencing were discussed by this Court in ***Narinder Singh*** v. ***State of Punjab***, (2014) 6 SCC 466. It would be apt to reproduce the said discussion at this juncture:

> 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.
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> 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 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 "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.

18) Likewise, this Court made following observations regarding sentencing in the cases involved in sexual offences in the case of ***Sumer Singh*** v. ***Surajbhan Singh and others***, (2014) 7 SCC 323.

> 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., page 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, methodized 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:

"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, '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 Pvt. Ltd.* v. *Ravinder Kumar Suri*, (2004) 8 SCC 307, the Court observed:

"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,* page 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 rationalized 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."

19) Merely because the appellant has now married hardly becomes a mitigating circumstance. Likewise, the appellant cannot plead that prosecutrix is also married and having a child and, therefore, appellant should be leniently treated. It is not a case where the appellant has married the prosecutrix. Notwithstanding the same, as noted above, the High Court has already reduced the sentence from seven years rigorous imprisonment to 4½ years under Section 376 of the IPC. Therefore, in any case, the appellant is not entitled to any further mercy. The appeal, accordingly, fails and is dismissed.

20) The appellant was released on bail during the pendency of the present appeal. He shall, accordingly, be taken into custody to serve the remaining sentence.

…….....J.
(Dipak Misra)

…….....J.
(A.K. Sikri)

New Delhi;
March 10, 2015