HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

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SB:- Hon'ble Shri Justice G. S. Ahluwalia

CRR 253/2005

Atibal and Others
Vs.
State of MP

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Shri Pavan Vijayvargiya, Advocate for applicants.
Shri Devendra Chaubey, Public Prosecutor for respondent/ State.

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ORDER

(Passed on 07/03/2018)

This Criminal Revision under Section 397/401 of Cr.P.C. has been filed against the judgment and sentence dated 2-4-2005 passed by 2nd A.S.J. (Fast Track Court), Sheopur in Criminal Appeal No.68 of 2005, by which the judgment dated 31-1-2005, passed by C.J.M., Sheopur in Criminal Case No.132/1990 was affirmed, by which the applicants were convicted under Section 148, 326/149 of I.P.C.. The applicants were directed to undergo the rigorous imprisonment of 6 months and fine of Rs.250/- and rigorous imprisonment of three years and fine of Rs.750/- with default imprisonment respectively, however, in appeal, the jail sentence of rigorous imprisonment of 3 years awarded by the Trial Court was reduced to rigorous imprisonment of 1 year and a fine of Rs.750/- with default imprisonment.

(2) The necessary facts for the disposal of the present revision in short are that on 14-10-1989, the complainant was sitting on a platform, situated outside his house. All the applicants came there. The applicant Atibal was armed with Gadasi, whereas Chhitu, Ramswaroop and Siyaram were armed with ballam, whereas Mohan and Laxman were having lathis. All the applicants surrounded the complainant and Chhitu gave a ballam blow on the

head of the complainant, whereas Siyaram caused ballam injury on the left elbow of the complainant. Ramswaroop gave a ballam blow on the left thigh of the complainant, whereas Atibal gave a Gadasi blow below the left eye of the complainant. Mohan and Laxman also assaulted him by lathis. Ghanshyam while intervening in the matter, caught hold the ballam of Siyaram, as a result of which he sustained an injury on his eye and leg. Similarly, Kanhaiya also sustained injuries during his intervention in the matter. Malkhan and Sugreev also intervened in the matter. On the report of the complainant, the FIR was registered. Spot Map, Ex. P.2, and the statements of the witnesses were recorded. Injured Deviram, Ghanshyam and Kanhaiya were got medically examined. The police after completing the investigation filed the charge sheet against the applicants. The matter was committed, however, it was again sent back to the Court of Magistrate, and accordingly, the case was tried by the Magistrate.

(3) The Trial Court after recording evidence and hearing both the parties, convicted the applicants for offence under Sections 148, 326/149 of I.P.C. and sentenced them to undergo the rigorous imprisonment of 6 months and a fine of Rs.250/- with default imprisonment and rigorous imprisonment of 3 years and fine of Rs.750/- with default imprisonment.

(4) Being aggrieved by the Judgment and Sentence awarded by the Trial Court, the applicants filed a criminal appeal. However, the applicants did not challenge their conviction for offence under Sections 148, 326/149 of I.P.C., but confined their arguments on the question of sentence. In absence of any challenge to their conviction, the appellate Court affirmed the findings recorded by the Trial Court and the conviction of the applicants for offence under Sections 148, 326/149 of I.P.C. was upheld.

(5) The Appellate Court, after considering the submissions with regard to the quantum of sentence, allowed the appeal, and the sentence of rigorous imprisonment of 3 years for offence under Section 326/149 of I.P.C. was reduced to rigorous imprisonment of 1 year and fine of Rs.750/- with default imprisonment and the

rigorous imprisonment of six months and fine of Rs.250/- for offence under Section 148 of I.P.C. was maintained and both the sentences were directed to run concurrently.

(6) Challenging the judgment and sentence passed by the Courts below, it is submitted by the Counsel for the applicants that the accused/applicant Atibal, who had caused a blow below the left eye of the complainant by means of a *Gadasi*, has already expired, and revision on his behalf has already stood abated. The jail sentence of rigorous imprisonment of one year is excessive, considering the manner in which the offence is alleged to have been committed. It is further submitted that the applicants had remained in jail for a period of 4 days during the trial, and were granted bail by order dated 6-6-2005 i.e., after 2 months from the date of judgment by the Trial Court, therefore, the applicants have already undergone, the actual jail sentence of near about 2 months and 8 days and the period already undergone by the applicants would be sufficient to meet the ends of justice. It is further submitted that the incident took place in the year 1989 and near about 28 years have passed and therefore, a lenient view may be adopted. To buttress his contention, the counsel for the applicants has relied upon the judgments passed by this Court in the cases of **Vikky @ Neeraj Bhasin vs. State of MP** reported in **2012(II) MPWN 98, Prabhulal vs. State of MP** reported in **2000(I) MPWN 209, Bhanu Giri vs. State of MP reported in 1999(II) MPWN 118** and also the judgment passed by the Supreme Court in case of **Bankat and Another vs. State of Maharashtra** reported in **AIR 2005 SC 368.**

(7) *Per contra,* it is submitted by the Counsel for the State that multiple injuries were caused to the complainant and other injured persons and thus, a very lenient view has already been adopted by the Appellate Court, which does not require further interference.

(8) Heard the learned Counsel for the parties.

(9) In order to find out the quantum of punishment, it would be necessary to consider the manner in which the offence is alleged to have been committed by the applicants.

(10) Deviram (P.W.1), Kanhaiya (P.W.3) and Sugreev (P.W.4) have supported the prosecution case, whereas Ghanshyam (P.W.2) has turned hostile and did not support the prosecution case.

(11) Deviram (P.W.1) has stated that he was assaulted by the applicants because of an old enmity. Earlier also, the applicants had beaten him as a result of which they were tried but they were acquitted. This witness was also tried for assaulting Siyaram and was punished with fine only. Thus, it is clear that there was an old enmity between the parties. Enmity is a double-edged weapon and if it provides a cause for false implication, then it also provides motive for committing offence. In the present case, as per M.L.C., Ex.P.5 as many as 7 injuries including incised and abrasions were found on the body of Deviram (P.W.1), whereas, as per M.L.C. Report, Ex.P.7, two injuries were found on the body of Kanhaiya. Although one injury was found on the body of Ghanshyam (P.W.2), but he himself had turned hostile. Therefore, the prosecution has established beyond reasonable doubt that as many as 7 injuries and two injuries were caused to Deviram (P.W.1) and Kanhaiya (P.W.3). The prosecution case is that Deviram (P.W.1) was sitting on a platform outside his house and without any provocation, he was assaulted by the applicants.

(12) Deterrence is one of the important aspects of the sentencing policy.

The Supreme Court in the case of **Shyam Narain Vs. State (NCT of Delhi),**reported in **(2013) 7 SCC 77** has held as under :-

> **''14.** Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted

to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

15. In this context, we may refer with profit to the pronouncement in *Jameel* v. *State of U.P.*, wherein this Court, speaking about the concept of sentence, has laid down that 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.

16. In *Shailesh Jasvantbhai* v. *State of Gujarat* the Court has observed thus: (SCC p. 362, para 7)

> "*7.* … 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."

17. In *State of M.P.* v. *Babulal*, two learned Judges, while delineating about the adequacy of sentence, have expressed thus: (SCC pp. 241-42, paras 23-24)

> "*23.* Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it is the duty of the court to impose on him such sentence as is

prescribed by law. The award of sentence is consequential on and incidental to conviction. The law does not envisage a person being convicted for an offence without a sentence being imposed therefor.

24. The object of punishment has been succinctly stated in *Halsbury's Laws of England* (4th Edn., Vol. 11, Para 482), thus:

> '482. *Object of punishment*.—The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. *The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided*."

(emphasis in original)

18. In *Gopal Singh* v. *State of Uttarakhand*, while dealing with the philosophy of just punishment which is the collective cry of the society, a two-Judge Bench has stated that just punishment would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of

discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors.

19. The aforesaid authorities deal with sentencing in general. As is seen, various concepts, namely, gravity of the offence, manner of its execution, impact on the society, repercussions on the victim and proportionality of punishment have been emphasised upon. In the case at hand, we are concerned with the justification of life imprisonment in a case of rape committed on an eight year old girl, helpless and vulnerable and, in a way, hapless. The victim was both physically and psychologically vulnerable. It is worthy to note that any kind of sexual assault has always been viewed with seriousness and sensitivity by this Court.''

The Supreme Court in the case of **Raj Bala Vs. State of Haryana** reported in **(2016) 1 SCC 463** has held as under :-

''4. We have commenced the judgment with the aforesaid pronouncements, and our anguished observations, for the present case, in essentiality, depicts an exercise of judicial discretion to be completely moving away from the objective parameters of law which clearly postulate that the prime objective of criminal law is the imposition of adequate, just and proportionate punishment which is commensurate with the gravity, nature of the crime and manner in which the offence is committed keeping in mind the social interest and the conscience of the society, as has been laid down in *State of M.P.* v. *Bablu*, *State of M.P.* v. *Surendra Singh* and *State of Punjab* v. *Bawa Singh*.

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16. A court, while imposing sentence, has a duty to respond to the collective cry of the society. The legislature in its wisdom has conferred discretion on the court but the duty of the court in such a situation becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One

> cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked. It is the duty of the court not to exercise the discretion in such a manner as a consequence of which the expectation inherent in patience, which is the "finest part of fortitude" is destroyed. A Judge should never feel that the individuals who constitute the society as a whole is imperceptible to the exercise of discretion. He should always bear in mind that erroneous and fallacious exercise of discretion is perceived by a visible collective.''

(13) Thus, if the facts of the case are considered, then it is clear that because of previous enmity, the applicants surrounded the complainant Deviram (P.W.1) and all of them were armed with deadly weapons and started assaulting the complainant. When Ghanshyam (PW2) and Kanhaiya (P.W.3), tried to intervene in the matter, they too were assaulted. As many as 7 injuries were found on the body of the complainant, whereas Kanhaiya (P.W.3) had suffered two injuries. Under these circumstances, this Court is of the considered opinion, that the Appellate Court, has already adopted a very lenient view by awarding the jail sentence of rigorous imprisonment of one year and a fine of Rs.750/- with default imprisonment for offence under Section 326/149 of I.P.C.

(14) As the conviction of the applicants was not challenged before the Trial Court, therefore, at this stage, the applicants cannot be allowed to take a summersault and cannot be permitted to challenge the conviction, because they have already given up their right to challenge the conviction before the Trial Court. Accordingly, the conviction of the applicants for offence under Sections 148, 326/149 of I.P.C. is accordingly upheld.

(15) The submission made by the Counsel for the applicants that since, the incident took place in the year 1989, therefore, a lenient

view may be adopted, cannot be accepted.The Trial Court convicted the applicants by judgment and sentence dated 31-1-2005.

(16) The record of the Trial Court reveals, that there was some delay on the part of the prosecution in producing the witnesses, but at the same time, several applications were filed on behalf of the applicants, seeking exemption from their personal appearance. The prosecution closed its evidence on 10-1-2002, and the statements of the applicants were recorded and thereafter, the case was fixed for final arguments on 23-5-2002, and the judgment was pronounced on 31-5-2002. The appeal filed by the applicants was allowed and the matter was remanded back by the appellate Court by order dated 6-7-2004. The Trial Court again heard the matter and delivered the judgment and sentence on 31-1-2005. In appeal filed by the applicants, they did not challenge the conviction and confined their arguments only to the question of quantum of sentence and the appeal was partly allowed and the sentence awarded by the Trial Court was reduced by the Appellate Court by judgment and sentence dated 2-4-2005. The record of the Trial Court as well as the Appellate Court reveals that on most of the time, applications under Section 317 of Cr.P.C. seeking exemption from personal appearance were filed. The present revision was filed in the year 2005. No application for urgent hearing was ever filed by the applicants. The case was taken up for final hearing on 25-9-2013, but at the request of the Counsel for the applicants, the case was adjourned. Thereafter, on certain occasions, there was default on the part of the applicants in appearing before the Registry of this Court, therefore, the case was taken up for the appearance of the applicants. Ultimately on 18-1-2018, when the case was taken up for hearing, none appeared for the applicants, as a result of which this Court was forced to issue bailable warrants against the applicants and therefore, the applicants and their Counsel appeared before the Court on 1-3-2018 and the case was heard. Thus, it is clear that the applicants are also responsible for delay. Thus, merely because the incident had taken place in the year 1989, therefore, no further lenient view

can be taken in favour of the applicants.

(17) So far as the quantum of sentence is concerned, the Appellate Court has granted sentence of rigorous imprisonment of 6 months and a fine of Rs.250/- with default imprisonment for offence under Section 148 of I.P.C. and rigorous imprisonment of 1 year and fine of Rs.750/- with default imprisonment for offence under Section 326/149 of IPC and the same is just and proper and accordingly, is hereby maintained.

(18) Consequently judgment and sentence dated 2-4-2005 passed by 2nd A.S.J. (Fast Track Court), Sheopur in Criminal Appeal No.68 of 2005, as well as judgment dated 31-1-2005, passed by C.J.M., Sheopur in Criminal Case No.132/1990, are hereby affirmed.

(19) The applicants are on bail. Their bail bonds and surety bonds are hereby cancelled. They are directed to immediately surrender before the Trial Court for undergoing the remaining jail sentence.

(20) The revision fails and is hereby **dismissed.**

(G.S. Ahluwalia)
Judge

MKB