

## ***A COMMENT ON BALDEV SINGH & OTHERS V. STATE OF PUNJAB***

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When an accused has been found guilty of an offence, the million dollar question that faces the judge is that of the appropriate sentence which is to be imposed on the convict. Sentencing is the last stage of the criminal process and is the most complex and difficult stage in the judicial process. Sentencing can never be a rigid and mechanical process. In choosing a fair and just sentence, judges must have regard to various factors including the nature of the offence, gravity of the offence, the manner and circumstances of commission of the offence, the personality of the accused, his family background, character, motivations for the crime, antecedents etc. Every legal system confers a wide discretion on the judges to choose the appropriate sentence. Individualization of punishment is possible only if such discretion is made available to the judge. Consistency of approach in sentencing in relation to one kind of offence is essential to maintain public confidence in the system. However we may not be able to achieve perfect consistency in outcome because of the infinite variety of circumstances with which the courts are presented. But when the discretion becomes wide and unfettered the result would be wide disparity and variation in sentences. Many studies on the sentencing practices followed in India has revealed that subjectivity of the judge plays a crucial role in the decision making process.<sup>1</sup> This is not at all desirable for a criminal justice system and a solution to this problem needs to be found at the earliest.

The case under comment, *Baldev Singh v. State of Punjab*<sup>2</sup> is an excellent example of “lawlessness” in sentencing rapists in

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<sup>1</sup> Dr. N.S. Soman & Dr. K. N. Chandrasekharan Pillai, *Rarest of Rare Case – A Myth*, 25 ACD. L, REV. 157, 184 (2001).

<sup>2</sup> *Baldev Singh & Ors. v. State of Punjab*, A.I.R. 2011 S.C. 1231.

the country. It shows the lack of consistency on the part of the Indian judiciary in dealing with the offence of gang rape. The decision has been rendered at a time when the incidence of rape cases is rising at an alarming rate. The factual matrix of the case is as follows. The prosecutrix was coming to her house after answering the call of nature at about 6.30 a. m. The three appellants caught her and took her into a house and committed rape. The Sessions Court convicted the appellants and sentenced them to 10 years of rigorous imprisonment and to pay a fine of Rs. 1,000/- each. The sentence was upheld by the High Court. On appeal a Division Bench of the Supreme Court comprising of Markandey Katju and Gyan Sudha Misra JJ. reduced the sentence to the period already undergone which is 3 and a half months. However each of the appellants was directed to pay a sum of Rs 50,000 each to the victim. The court wrote a very short and cryptic judgment and none of the precedents on this aspect were quoted.

The Indian Penal Code, 1860 (*hereinafter* "I.P.C."), provides that whoever commits rape shall be punished with imprisonment of either description for a term which shall not be less than 7 years but which may be for life or for a term which may extend to 10 years and shall also be liable to fine.<sup>3</sup> For the special category of cases covered under Section 376 (2), the sentence cannot be less than 10 years but which may be for life and shall also be liable to fine. Enhanced sentences for gang rape were introduced by way of an amendment in 1983.<sup>4</sup> The amendment was introduced on the recommendations of the Law Commission of India which enquired into the inadequacies of the criminal law to protect women who have been victim of rape or assaults on their modesty.<sup>5</sup> Mandatory minimum sentence was introduced with a

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<sup>3</sup> PEN. CODE § 376(1) (1860).

<sup>4</sup> The Criminal Law (Amendment) Act, 1983, No. 43, Acts of Parliament, 1983.

<sup>5</sup> LAW COMMISSION OF INDIA, EIGHTY FOURTH REPORT ON RAPE AND ALLIED OFFENCES: SOME QUESTIONS ON SUBSTANTIVE LAW, PROCEDURE AND EVIDENCE (1980).

view to effectively combat sexual crimes against women. However to meet extremely rare contingencies and very exceptional situations, a discretion was conferred on the court to award sub-minimum sentence. The proviso appended to both the sub-sections lays down 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 the statutory minimum. The consequential effect of the proviso appended to the section was that it nullified the effect of the provision prescribing minimum sentence for rapists. We find umpteen instances wherein some reason is carved out by the judiciary as a "special and adequate reason" for awarding a sub-minimum sentence.<sup>6</sup>

In the case under comment the court relied on the following facts in awarding the subminimum sentence:

*"The incident is 14 years old. The appellants and the prosecutrix are married (not to each other). The prosecutrix has also two children. An application and affidavit has been filed before us stating that the parties want to finish the dispute, have entered into a compromise on 01.09.2007, and that the accused may be acquitted and now there is no misunderstanding between them. Section 376 is a non compoundable offence. However the fact that the incident is an old one, is a circumstance for invoking the proviso to Section 376 (2) (g) and awarding a sentence less than 10 years which is ordinarily the minimum sentence under that provision, as we think that there are adequate and special reasons for doing so".<sup>7</sup>*

A perusal of the grounds relied on by the court in reducing the sentence to the period already undergone shows

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<sup>6</sup> V. Unnikrishnan, *Supreme Court on Sentencing Rapists- Recent Trends*, 25 ACD. L. REV. 109, 128 (2001).

<sup>7</sup> *Supra* note 2, at 1232.

that the court was not justified in awarding the subminimum sentence. The court has utterly failed to render justice to the society and the victim of the crime. Punishment must fit the crime and it is the duty of the court to impose a proper punishment depending on the degree of criminality and desirability for imposing such punishment.

If we take the facts relied on by the court one by one, none of them seems to be special or adequate. The benefit of the long pendency of the case has been given to the convict. The case took 14 long years to be finally decided and settled by the Supreme Court. Our criminal justice administration system alone is to be blamed for the long pendency of the cases. Delay in proceedings is very common in the Indian judicial process. Hence it should not be considered as a mitigating factor in reducing the sentence. The convict should never be allowed to enjoy the benefit arising out of delay in proceedings because this may in turn give an incentive to the accused in delaying proceedings.

The second reason quoted by the court is that the victim is married and has two children. The facts are silent as to whether she got married prior to the incident or not. The fact that the victim was married ought not to have been considered as a relevant factor in mitigating the sentence. The court seems to have proceeded on the wrong assumption that married women's chastity has no value at all. It may be true that in the case of unmarried girls, being subjected to rape affects their prospects for marriage. Equally relevant is the fact that in the case of married women their husband and children are also specially affected and mentally wounded. Any rape incident affects the family and social prestige of the woman. The right not to be raped is a fundamental right of every woman, irrespective of whether she is a virgin or a married person.

The compromise entered into by the parties is another factor based on which lesser punishment has been awarded.

The court relies on the fact that “now there is no misunderstanding between the parties”. The court ought not to have considered this factor. Rape is a non-compoundable offence. A crime is an offence against the society and is not a matter to be left for the parties to compromise and settle. Whether the consent given by the victim in compromising the case is a real consent is yet another question to be looked into. She might have been pressurised by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. The court has indirectly compounded the offence by using the discretionary power in awarding sub-minimum sentence. In effect the court has entertained plea bargaining between the accused and the victim. This goes against the legislative mandate because even though the legislature had introduced plea bargaining into the criminal justice system, it had clearly exempted crimes against women from being subject to a plea bargaining<sup>8</sup>. The judgment would be a blessing in disguise for the rapists. They can negotiate and bargain with the victim and the case can be settled for a pretty sum.

The decision of the Supreme Court is not supported by earlier precedents. In *State of Karnataka v. Krishnappa*<sup>9</sup> a Bench consisting of Dr. A.S. Anand, C.J., R.C. Lahoti and S.N. Variava JJ. considered the question as to circumstances under which a subminimum sentence could be awarded for the offence of rape. In this case the High Court had 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”. 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. Dr. A.S. Anand, C.J., who authored the judgment, held that these factors did not justify recourse to the proviso to Section 376(2) of I.P.C. to impose a sentence less than the prescribed minimum. These reasons were held 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 needed to be severely dealt with. Socio-economic status, religion, race, caste or creed of the accused or the victim were irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of criminal law and that was required to be achieved by imposing an appropriate sentence. The sentencing courts shall consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the gravity of the crime.<sup>10</sup>

In *Kamal Kishore v. State of Himachal Pradesh*<sup>11</sup> the accused was charged with the offence of raping a girl of 10 years old. The trial court acquitted him. But on appeal filed by the state the High Court convicted and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs 10,000. The Division Bench refrained itself from awarding the minimum sentence prescribed by law for the offence on the premise that the accused who was twenty five "might have settled in life". The learned counsel for the accused projected some additional facts to support his contention that there were adequate and special reasons to award a lesser sentence. The victim had since been married to another person and she was then a mother of children and was well-settled in life. The accused was aged 23 when the offence was committed and when the appeal was heard he was 34. But he remained unmarried. He said 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

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<sup>8</sup> CODE CRIM. PROC. § 265 A (1973).

<sup>9</sup> *State of Karnataka v. Krishnappa*, (2000) 4 S.C.C. 75.

<sup>10</sup> *Id.* at 83.

to the social stigma and disrepute which surrounded him. The Supreme Court held that the circumstances pleaded by him were not special reasons for tiding over the legislative mandate for imposing the minimum sentence and enhanced the sentence for the offence under Section 376 of I.P.C. to imprisonment for 7 years. The Supreme Court strictly interpreted the expression “adequate and special reasons” to the benefit of the victim. The Supreme Court observed:

*“The expression “adequate and special reasons” indicates that it was 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 could be regarded as special reasons. No catalogue can be prescribed for adequacy of reasons nor any instance can be cited regarding special reasons, as they may differ from case to case”.<sup>12</sup>*

In *Bhupinder Sharma v. State of Himachal Pradesh*<sup>13</sup>, the Supreme Court reiterated that in order to exercise the discretion of reducing the sentence provided in I.P.C. for rape, the Court has to record “adequate and special reasons” in the judgment. Sub-minimum sentence cannot be awarded on the ground of fanciful reasons. The reason recorded by the

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<sup>11</sup> Kamal Kishore v. State of Himachal Pradesh, (2000) 4 S.C.C. 502.

<sup>12</sup> *Id.* at 507.

<sup>13</sup> Bhupinder Sharma v. State of Himachal Pradesh, A.I.R. 2003 S.C. 4684.

sentencing court has not only to be adequate but also special. The Supreme Court observed that what is adequate and special would depend upon several factors and no strait-jacket formula can be imposed.<sup>14</sup>

In *State of M.P. v. Bala*<sup>15</sup>, the full bench decision rendered by the Supreme Court held that discretionary power under Section 376(1) of I.P.C. should be sparingly used and that the long pendency of the criminal case shall not be taken as an adequate reason to award lesser sentence. P.K. Balasubramanyan J. observed :

*“The crime here is rape. It is a particularly heinous crime, a crime against society, a crime against human dignity, one that reduces a man to an animal. The penal statute has prescribed a maximum and a minimum punishment for an offence under Section 376 I.P.C. To view such an offence once it is proved, lightly, is itself an affront to society. Though the award of maximum punishment may depend on the circumstances of the case, the award of the minimum punishment, generally, is imperative. The provisos to Section 376(1) and 376(2) I.P.C. give the power to the court to award a sentence lesser than the minimum for adequate and special reasons. The power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases*

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<sup>14</sup> *Id.* at 4688.

<sup>15</sup> *State of M.P. v. Bala @ Balaram*, A.I.R. 2005 S.C. 3567 (The trial court convicted the accused and awarded a sentence of 10 years R.I. and a fine of Rs. 3,000/-and in default to undergo R.I. for a further period of six months under Section 376(2)(g) I.P.C. The High Court partly allowed the appeal and while upholding the conviction of the accused on various counts reduced the sentence to the period already undergone which is nearly 9-1/2 months. On appeal the Supreme Court set aside the order of the High Court and remanded it back to the High Court for a fresh hearing).



*where special facts and circumstances justify a reduction. The reasons must be relevant to the exercise of such discretion vested in the court. The reasons must be set out clearly and cogently. The mere existence of a discretion by itself does not justify its exercise. The long pendency of the criminal trial or the offer of the rapist to marry the victim are not relevant reasons. Nor is the age of the offender by itself an adequate reason".<sup>16</sup>*

The I.P.C. does not lay down the sentencing policy to be followed with respect to the offences, but leaves it to the discretion of the judge. Discretion oriented sentencing is idealistic in spirit as it enables the court to individualise the penal measures in its proper sense. Individualisation of punishment should not degrade into liberalization of punishment. The Apex Court, while awarding the punishment for rape should not forget the unimaginable trauma, degradation and humiliation suffered by the victims of rape. Rape is an obnoxious act of the highest order affecting the dignity of a woman. The legislative intent to curb the offence of rape with iron hand can be inferred from the Criminal Law (Amendment) Act, 1983 which provided enhanced sentences for gang rape.<sup>17</sup> The legislative history of the amendment points the need for strictly interpreting the term "adequate and special" reasons. If a compromise is taken as "special and adequate reason" we would be going back to the pre-1983 situation which saw many *de facto* rapists escaping the clutches of law. The author strongly feels that a compromise entered into between the rape victim and the offender shall not be taken as a valid ground for awarding sub-minimum sentence. Rape is a crime against the entire

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<sup>16</sup> *Id.* at 3569.

<sup>17</sup> See Pmb. to Criminal Law (Amendment) Act, 1983, No. 43, Acts of Parliament (1983).

women folk and the society at large. In the present case under comment, the Honourable Supreme Court has acted against the legislative mandate. Entertaining the compromise made by the rape victim and the accused is a clear case of abuse of judicial discretion. The Supreme Court went wrong in allowing the parties to settle the issue by themselves. The Apex Court must realize that “loss” suffered by the victim of rape cannot be restored by directing the offender to pay a hefty sum. Issuing such directions would only reflect the insensitivity of the judiciary to the immeasurable agony of the rape victims. Rape is not a fit case to apply the restorative principles of justice. If at all some compensation is awarded to the victim, it can only be in addition to the minimum sentence provided and not a substitute for it.

The judiciary while dealing with an offence involving much social concern should imbibe the legislative spirit and award due punishment considering the gravity of the concerned offence and its impact on the society. Imposition of sentence without considering its effect on the social order will turn out to be counter productive. Offences such as gang rape require exemplary treatment. Any liberal attitude towards such heinous offenders will go against societal interest. In dealing with heinous crimes, deterrence and prevention should be the prime objective of punishment. Punishment should be commensurate with the gravity of the offence and its impact on society. The observation of the Supreme Court in an earlier case is worth quoting. In *Earabhadrapa v. State of Karnataka*<sup>18</sup>, the Court observed,

*“A sentence or pattern of sentence which fails to take due account of the gravity of the offence can seriously undermine respect for law. It is the duty of the court to impose a proper punishment depending upon the*

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<sup>18</sup> Earabhadrapa v. State of Karnataka, A.I.R. 1983 S.C. 446.

*degree of criminality and desirability to impose such punishment as a measure of social necessity as a means of deterring other potential offenders”.*<sup>19</sup>

Though we can be proud of our past culture, the era of worshipping “Devimathas” and respecting womanhood, cases of molestation and rape are steadily increasing and respect for womanhood in our country is on the decline. Decency and morality in public and social life can be protected only if Courts deals strictly with those who violate the social and legal norms. The judgment in case of *Baldev Singh & Ors. v. State of Punjab*<sup>20</sup> needs to be reviewed in this contex

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<sup>19</sup> *Id.* at 452.

<sup>20</sup> *Supra* note 2.