CASE NO.:
Appeal (crl.) 516 of 1996

PETITIONER:
STATE OF RAJASTHAN

Vs.

RESPONDENT:
KISHANLAL

DATE OF JUDGMENT: 10/05/2002

BENCH:
Y.K. SABHARWAL, BISHESHWAR PRASAD SINGH.

JUDGMENT:

BISHESHWAR PRASAD SINGH, J.

This appeal by special leave preferred by the State of Rajasthan is directed against the judgment and order of the High Court of Rajasthan at Jaipur, Jaipur Bench, Jaipur dated 26th April, 1991 in S.B. Criminal Appeal No. 371 of 1990.

By the impugned judgment the High Court while convicting the respondent of the offence under Section 376 of the Indian Penal Code reduced his sentence to the period already undergone. It appears that the respondent had undergone a sentence of about 2 years when the impugned judgment was passed. Earlier the learned Additional Sessions Judge, Baran, had found the respondent guilty of the offences under Sections 376 and 457 IPC and had sentence him to undergo 7 years rigorous imprisonment under Section 376 IPC and a fine of Rs.500/-, in default to six months simple imprisonment. He also sentenced him to 1 year rigorous imprisonment under Section 457 IPC and a fine of Rs.200/-, in default, 3 months simple imprisonment.

Since the respondent was un-represented before us, we requested Shri Alok Bhachawat, Advocate, to assist us as an amicus curiae. He has rendered very good assistance to the Court.

At the outset counsel for the State submitted that the High Court clearly erred in law in reducing the sentence passed against the respondent to the period already undergone, which was impermissible in view of the expressed provision of Section 376 IPC which mandates that on finding the accused guilty of the offence under Section 376 IPC, in a case of this nature, the accused shall be sentenced 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. The proviso to Section 376, however, provides that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. In the judgment the learned Judge has not recorded any adequate or special reasons for reducing the sentence to the period already undergone except for stating that the respondent had remained in custody since the year 1988 and in such cases courts have taken a lenient view. We have no doubt that such a statement does not answer

the description of an adequate and special reasons which were required to be mentioned in the judgment. Learned amicus curiae could not advance any argument to support the order of the High Court reducing the sentence to the period already undergone. It is, therefore, patent that the order reducing the sentence of the respondent is illegal and cannot be sustained.

Learned counsel for the respondent, however, submitted that the State of Rajasthan has preferred, by special leave, the present appeal challenging the legality of the order sentencing the respondent to the period already undergone and the effect of the appeal being allowed is that the sentence of the respondent may be enhanced to a minimum of 7 years. He, therefore, submitted that this Court should permit the respondent to argue for an acquittal since the appeal by special leave, for all practical purposes, is an appeal for enhancement of the sentence. It is, therefore, submitted that this Court in exercise of its extra ordinary jurisdiction under Article 136 of the Constitution of India may apply the principle analogous to the one enshrined in Section 377(3) of the Code of Criminal Procedure which in term provides that when an appeal is filed against the sentence on the ground of its inadequacy, the accused while showing cause may plead for his acquittal or for the reduction of the sentence.

Learned counsel for the State submitted that the appeal preferred by the State is not an appeal for the enhancement of the sentence but for setting aside an order passed by the High Court imposing a sentence which is patently illegal and contrary to the express mandate of the provision. It is no doubt true that the State has preferred the appeal challenging the legality of the sentence. In that sense it is not an appeal for enhancement of sentence on the ground of its inadequacy. However, it is equally true that if the sentence is found to be illegal and set aside and appropriate sentence imposed, it would result in the enhancement of the sentence. The only consequence of the State appeal being allowed would be to enhance the sentence and, therefore, we are of the view that the appeal in effect is for enhancement of the sentence of the respondent on the ground that the sentence imposed against him is not in accordance with law, and not adequate, since it is less than the minimum sentence prescribed under the law.

The next question which arises for consideration is whether this Court should apply the principles enshrined in Section 377(3) of the Code of Criminal Procedure to an appeal before this Court for enhancement of sentence.

Learned counsel for the State submitted that Section 377 of the Code of Criminal procedure is applicable only to an appeal for enhancement of sentence preferred before the High Court. In terms that section does not apply to an appeal before the Supreme Court under Article 136 of the Constitution of India for enhancement of sentence.

Learned amicus curiae rightly submitted that this question is no longer res integra. In the State of U.P. vs. Dharmendra Singh and another : JT 1999 (7) SC 207 this Court considered Section 377(3) of the Code of Criminal Procedure and observed, thus :-

"A perusal of this Section shows that this provision is applicable only when the matter is before the High Court and the same is not applicable to this Court when an appeal for enhancement of sentence is made under Article 136 of the Constitution. It is to be noted that an appeal to this Court in criminal matters is not provided under the Code except in cases covered

by Section 379 of the Code. An appeal to this Court under Article 136 of the Constitution is not the same as a statutory appeal under the Code. This Court under Article 136 of the Constitution is not a regular court of appeal which an accused can approach as of right. It is an extraordinary jurisdiction which is exercisable only in exceptional cases when this Court is satisfied that it should interfere to prevent a grave or serious miscarriage of justice, as distinguished from mere error in appreciation of evidence. While exercising this jurisdiction, this Court is not bound by the rules of procedure as applicable to the courts below. This Court's jurisdiction under Article 136 of the Constitution is limited only by its own discretion (See Nihal Singh & Ors. v. The State of Punjab [AIR 1965 SC 26]). In that view of the matter, we are of the opinion that Section 377(3) of the Code in terms does not apply to an appeal under Article 136 of the Constitution..

This does not mean that this Court will be unmindful of the principles analogous to those found in the Code including those under Section 373(3) of the Code while moulding a procedure for the disposal of an appeal under Article 136 of the Constitution. Apart from the Supreme Court Rules applicable for the disposal of the criminal appeals in this Court, the Court also adopts such analogous principles found in the Code so as to make the procedure a "fair procedure" depending on the facts and circumstances of the case".

This Court, therefore, permitted the respondents to argue for an acquittal in the appeal preferred by the State of U.P. for enhancement of the sentence by adopting analogous provision found in Section 377 (3) of the Code of Criminal Procedure.

Learned amicus curiae submitted that in exercise of jurisdiction under Article 136 of the Constitution of India, this Court has set up judicious precedents for the purpose of averting miscarriage of justice and that is why in some cases where the Court reached the conclusion that no conviction of any accused is possible, the benefit of that decision was extended to the co-accused, also though he may not have challenged the order by means of an appeal petition to this Court. (See Raja Ram and others vs. State of M.P. : (1994) 2 SCC 568 and Dandu Lakshmi Reddy vs. State of A.P. : (1999) 7 SCC 69.)

Learned amicus curiae submitted that this is an appropriate case where he should be permitted to argue for the acquittal of the respondent and we permitted him to do so.

With the assistance of learned counsel appearing for the parties, we have gone through the record placed before us and we have carefully scrutinized the testimonies of the witnesses examined at the trial.

The prosecution was initiated by the lodging of a First Information Report by Smt. Dhulibai, prosecutrix at P.S. Chheepa Barod on the morning of 8th December, 1985. She reported that on last night her husband Chhitarlal, PW.11 alongwith his brother Ram Dayal, PW.2 had gone to witness the Ramlila. She was alone in the house. Her brother-in-law's wife was sleeping in the other house. While going to Ramlila her husband had bolted the house from outside. At about 11-12 O' clock at night she woke up as someone

opened the door. She recognized the respondent Kishanlal and asked him as to why he had come. He said that he had come to have sexual intercourse with her. He put off the chimney (oil lamp). She started crying but the respondent inserted a piece of cloth in her mouth. He pressed her breasts and in the scuffle 2 buttons of her blouse were broken. Thereafter he had sexual intercourse with her. He then said that he will give her Rs.20/- and will also call Pholia for the same purpose. At about that time her husband and brother-in-law returned home. She narrated the story to her husband. Respondent Kishanlal who was present in the house tried to run away but her husband and brother-in-law and some other persons of the village ran after him. The respondent fell on the stones and injured himself. He was, however, caught and kept tied in the house. Since they could not come to the police station in the night, they came to report the matter next morning.

The case was investigated by PW.7 Shyamlal, Station House officer of Police Station Chheepa Barod. He prepared the site plan, seized the clothes of the prosecutrix and the respondent which were sent for the report of the Chemical Analyser. He arrested respondent Kishanlal on 12th December, 1985 even though he was produced before him on 8th December, 1985 because during this period he was undergoing treatment in the hospital. There were injuries on the head and body of the accused.

From the suggestions made to the witnesses it appears to be the defence of the respondent-accused Kishanlal that PW.12 Dhulibai, prosecutrix was a consenting party. Apart from the formal witnesses such as the panch witnesses PW.4 & PW.6 and PW.18, who had carried the articles to the Forensic Science Laboratory, the prosecution has examined the husband of the prosecutrix Chhitarlal as PW.11 and prosecutrix Smt. Dhulibai as PW.12 and four witnesses, namely Kanhiyalal, PW.1 ; Ramdayal, PW.2 and Radhakishan PW.3 and Balchand, PW.4, who arrived at the house of the prosecutix soon after the occurrence.

The case of the prosecution is that PW.11 Chhitarlal, husband of the prosecutrix came first followed by PW.2 Ramdayal who came 2-3 minutes later. PW.3 and PW.4 came at a stage when the respondent had been apprehended and tied up.
Having regard to the defence of the respondent it would be necessary to critically scrutinize the evidence of PW.11 and PW.12, namely Chhitarlal, husband of the prosecutrix and the prosecutrix herself. Chhitarlal, PW.11 stated that he knew accused Kishanlal. On the night of occurrence when he returned home, he found the doors of the house open and could hear the female child of 2 years old weeping. His wife Dhulibai told him that Kishanlal had raped her. At that time Kishanlal was in the house. After hearing his voice Kishanlal started running away but he chased him and caught him in the house itself. On the next morning he alongwith his wife went to the police station and lodged the report.

In cross-examination he stated that he came to his house first and his brother Ramdayal, PW.2 came 2-3 minutes later. Respondent Kishanlal was of another village and the distance between his village and the village of the respondent is nearly one mile. He used to come to his village quite frequently. He denied the suggestion that he had assaulted the accused and stated that the injuries were sustained by him by his falling on the stones. He categorically denied the suggestion that the accused was caught outside the house. He had called the Sarpanch in the night and apart from him, large number of persons who had gone to Ramlila had also come. His wife had told them about the misdeeds of the respondent. Next morning at about 9 to 10 O’ clock a report was lodged. He denied the suggestion that accused used to come to his house even on earlier occasions. He

stated that his wife did not tell him that the accused had told her that he will bring another person for the same deed and that she will be paid for that. The distance of his house and that of his brother is about 30 feet. He further stated that his wife was weeping when she was sexually assaulted. He asked his wife whether the accused had done so with her consent or without her consent and she had replied that she had not consented, and that it was done forcibly.

Smt. Dhulibai, PW.12, prosecutrix stated that she knew the accused. On the night of the occurrence her husband had gone to watch the Ramlila after bolting the outer doors. She was sleeping with her 5-6 months old child and her brother-in-law was sleeping in her room alongwith his wife nearly 20-25 feet away. At about 10-12 O' clock in the night, the accused entered her house whom she recognized in the light of the chimney. On being asked as to why he had come in the night, the accused replied that he had come to have sexual intercourse with her. He broke the buttons of her blouse. He pressed her breasts and caused abrasions by his nails on her breasts. In the meantime the child got up and started weeping. He slapped her. It is further stated that when she cried, he put a handkerchief in her mouth. When she continued to cry, the accused had shown her a knife and threatened her that he will stab her if she makes noise. She also stated that he told her that he will give her Rs.20/- but did not give the money. He had sexual intercourse with her. In the meantime her husband came . Her husband asked her as to whether she had called him, and she replied in the negative. When the accused started running away, her husband caught him. After sometime her brother-in-law Ramdayal also came. They caught the accused and tied him up. Next morning they went to the police station and lodged the report.

In her cross-examination she admitted that she knew the accused for about 6 months before the incident. But she denied the suggestion that accused used to come to her house very often. The handkerchief that was inserted in her mouth was seized by the police. She had been medically examined.

She then stated that when her husband came inside the house, the accused was actually having intercourse with her. The bolts of the doors were left open after the accused had come inside. It was her husband who removed the accused from her body. Ramdayal, PW.2 came later. The accused was caught by her husband in the house itself. She denied that he was caught near the stones and stated that the statement recorded by the police in the course of the investigation that he fell on the stones after dashing against it was wrong. According to her the accused was not beaten by anyone. She denied the suggestion that all this happened with her consent and that she had called the accused. She, however, admitted that the accused had told her that he will give her Rs.20/- and that Rs.20/- will be given by Phulia for the same favour. She denied the suggestion that she started shouting only after seeing the persons coming inside the house. According to her, after the respondent was tied, he started dashing against the stones as a result of which he sustained injuries. She denied the suggestion that her husband had caused the abrasions on her breasts.

The medical officer of the Family Health Center, PW.9, who examined the prosecutrix stated that he had found two abrasions on the breasts 1 cm x 1 cm. which were caused within 24 hours of the examination. He confirmed the fact that Dhulibai had been raped. He had also examined the accused and found that he was capable of having sexual intercourse. He, however, stated that the prosecutrix appears to have had intercourse with her husband and the injuries on the private parts could be caused in the course of intercourse. He also stated that the abrasions on the breasts of the prosecutrix could be self

inflicted.

It is rather surprising that the accused entered the house at night and though the brother-in-law of the prosecutrix and his wife were sleeping only 20-25 feet away, the prosecutrix could not raise alarm so as to attract their attention. It further appears that the prosecutrix was known to the accused and that is why the first question asked by her was as to why he had come in the night. To this the accused replied stating that he wanted to have sexual intercourse with her. In the First Information Report as well as in the deposition of Dhulibai, prosecutrix and Chhitarlal, PW.11 then is a mention of the fact that the accused offered her Rs.20/- for having sexual intercourse with her and also stated that one Phulia will also pay her the same amount for having sexual intercourse with her. This is not disputed by the prosecutrix. This gives an impression that the prosecutrix and the respondent were quite intimate. The other surprising feature of the case is that the husband of the prosecutrix after entering the house did not straightaway chase the accused. He first questioned his wife as to whether she had called him, and only after her stating that she had not called him and that he had forcibly raped her, he started chasing the respondent and caught him. This again probablises the fact that the husband also had at least some suspicion about the nefarious activities of his wife, otherwise it would be quite unnatural for a husband asking his wife, even before attempting to catch the accused, as to whether she had called him, and whether the accused had sexual intercourse with her consent.

There is yet another aspect of the matter. According to the prsoecutrix she was having sexual intercourse with the accused when her husband came. According to her, it was her husband who separated the accused from her. The husband of the prosecutrix has not said so, though at one place he has stated that his wife was weeping when the accused was having sexual intercourse with her. It appears that the prosecutrix was offering no resistance while she was having sexual intercourse, when suddenly her husband entered the room. It was, therefore, contended on behalf of the respondent that it was only when her husband entered the room, she started raising hue and cry. It was sought to be argued on behalf of the State that the respondent had carried a knife with him and had threatened the prosecutrix with the knife and, therefore, on account of fear, she could not raise an alarm or resist the respondent. In addition he had forced a handkerchief in her mouth. It is indeed surprising that the knife has not been exhibited in the trial, nor does it appears to have been seized in the course of investigation. If the respondent had brought a knife with him, and it is the prosecution case that he was caught hold of within the precincts of the house itself, he had obviously no opportunity of throwing away the knife. In the normal course the knife should have been recovered from the house of the prosecutrix. The non-seizure of the knife raises a serious suspicion about the truthfulness of the prosecution version that the respondent had sexual intercourse with the prosecutrix under threat.

Having regard to these features of the case, the probability of the accused having had sexual intercourse with the prosecutrix with her consent cannot be ruled out. The features that we have noticed above probablise the defence of the respondent, and we entertain serious doubt about the truthfulness of the prosecution case that the accused had sexual intercourse with the prosecutrix without her consent.

In the facts and circumstances of the case, we are of the view that the respondent is entitled to the benefit of doubt. In the result this appeal is disposed of with a finding that though the sentence imposed by the High Court was illegal, having considered the evidence on record, we are satisfied that the respondent is entitled to the benefit of

doubt. The appeal is, therefore, dismissed and the respondent is acquitted of all the charges levelled against him. The bail bonds of the respondent are discharged.

We have appreciated the efforts put in by Shri Alok Bhachawat, Advocate, who has rendered useful assistance to the Court. He shall be paid the prescribed fee payable to an amicus curiae as per the rules.