IN THE HIGH COURT OF JAMMU &KASHMIR AND LADAKH AT SRINAGAR

Reserved on: 20.04.2023
Pronounced on: 09 .05.2023

CRA No.15/2016

NAZIR AHMAD GANIE
...APPELLANT(S)

Through: - Mr. S. T. Hussain, Sr. Adv. with
Ms. Nida Nazir, Advocate.

Vs.

STATE OF J&K
…RESPONDENT(S)

Through: - Mr. Furqan Yaoob, GA.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) Appellant, Nazir Ahmad Ganie, has filed the instant appeal against the judgment of conviction dated 09.05.2015 and the order of sentence dated 23.05.2015 passed by learned Principal Sessions Judge, Pulwama, whereby he has been convicted of offence under Section 304 Part II of RPC and in proof of the said offence, he has been sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1.00 lac. In default of payment of fine, the appellant has been directed to undergo further imprisonment of one year.

2) As per prosecution case, on 16th August, 2011, PW (9) lodged a written report with SHO, P/S Pulwama, alleging therein that at about 9.00 am, when his son Danish Farooq alias Umar Farooq was on his way to school, he was attacked by accused persons, including the

appellant herein, with clubs. It was alleged that as a result of this attack, the deceased received fatal injuries and that all the three accused had hatched a conspiracy to kill the deceased.

3) FIR No.25/2011 for offences under Section 302, 34 RPC came to be registered with Police Station, Pulwama, and investigation of the case was set into motion. After investigation of the case, it was found that the appellant along with co-accused Gh. Ganaie and Maqbool Ganaie caught hold of deceased Danish Farooq and he was given beating by kicks, fists and hands. It was also found that the appellant, who was armed with a club, gave a blow on the head of the deceased with an intention to kill him, as a result of which the deceased fell down and died on spot. Thus, offences under Section 302/34 of RPC were found established against the appellant and other two co-accused and the challan was laid before the trial court. The charges for the aforesaid offences were framed against the accused, including the appellant herein and they were put on trial.

4) During trial of the case, the prosecution examined all the listed witnesses, whereafter the statements of the accused under Section 342 of J&K Cr.P.C were recorded and the incriminating circumstances appearing in the statements of prosecution witnesses were put to them to seek their explanation. The accused entered defence and examined as many as three witnesses in defence.

5) The learned trial court, after hearing the parties and after appreciation of the evidence led before it, passed the impugned

judgment dated 09.05.2015, whereby, while the appellant herein was convicted of offence under Section 304 Part-II of RPC, the other two accused, namely, Gh. Ganaie and Maqbool Ganaie, were convicted of offence under Section 323 of RPC. Charge for offence under Section 302 RPC was not established against the accused.

6) The learned trial court thereafter proceeded to hear the parties on the question of sentence and passed impugned order dated 23.05.2015, whereby the appellant was, in proof of offence under Section 304 Part-II of RPC, sentenced to undergo rigorous imprisonment of seven years and to pay a fine of Rs.1.00 lac. In default of payment of fine, the appellant has been directed to undergo further imprisonment of one year. It has also been provided in the said order that the amount of fine shall be paid as compensation to the mother of the deceased Danish Farooq. Besides this, the learned trial court has also directed that mother of the deceased shall be paid further amount of Rs.2.00 lacs as compensation in terms of Victim Compensation Scheme, 2013. The other two accused who were convicted of offence under Section 323 RPC, have been sentenced to undergo simple imprisonment of one year and to pay a fine of Rs.1000/ each and in default of payment of fine, the said accused have been directed to undergo further imprisonment of one month.

7) The present appeal has been filed by convict Nazir Ahmad Ganai. Although the appellant has challenged the impugned judgment/order of conviction and sentence on merits, yet during the course of hearing, learned Senior counsel appearing for the appellant

has submitted that the appellant does not intend to challenge the judgment of conviction passed by the learned trial court and that the appellant is only aggrieved of the quantum of sentence awarded by learned trial court against him.

8) It has been contended by learned Senior counsel appearing for the appellant that the learned trial court has not given any cogent reasons for awarding imprisonment of seven years against the appellant nor has it given any plausible reasons for imposing fine of Rs.1.00 lac upon the appellant. It has been submitted that the appellant was a teacher working in a private school earning a meagre salary and, as such, it was not open to the learned trial court to impose a heavy penalty of Rs.1.00 lac upon the appellant. The learned Senior counsel has submitted that the sentence awarded to the appellant by virtue of the impugned order dated 23.05.2015 deserves to be modified by sentencing the appellant to imprisonment for the period already undergone by him.

9) Learned counsel appearing for the State has contested the contentions raised by learned Senior counsel appearing for the appellant and submitted that the act of the appellant has resulted in death of a young boy and having regard to the gravity of the crime committed by the appellant, the sentence awarded by the learned trial court against the appellant does not deserve to be interfered with.

10) I have heard learned counsel for the parties and perused the record of the case. I have also gone through the impugned judgment/order and the evidence on record.

11) As already noted, the only question that is required to be determined in this appeal is as to whether there is any scope for interference in the quantum of sentence awarded by learned trial court against the appellant. The appellant has been convicted of offence under Section 304 Part-II of RPC. So far as the offence under Section 304 Part-II of RPC is concerned, the same carries punishment of imprisonment of either description for a term which may extend to ten years or with fine or with both. The learned trial court, in the instant case, has awarded imprisonment of seven years and a fine of Rs.1.00 lac against the appellant, who has prayed for reduction of the sentence.

12) Chapter III of the RPC deals with punishment and it covers Sections 53 to 75 of RPC. Section 53 classifies the punishment into six categories. Section 63 of the RPC provides that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited but shall not be excessive. Section 64 provides that in a case where an offender is sentenced to imprisonment as well as fine, in default of payment of fine, the offender can be sentenced to imprisonment which shall be in excess of any other imprisonment to which he may have been sentenced. As per Section 65, the imprisonment in default of payment of fine cannot exceed one-fourth of the term of maximum imprisonment provided for the said offence.

13) From a reading of the aforesaid provisions, it is clear that when an offender is sentenced to imprisonment, in default of payment of fine, he has to suffer further imprisonment in excess of the imprisonment

awarded against him for the substantive offence. It is also provided that imprisonment for non-payment of fine has not to exceed one-fourth of the maximum term of imprisonment prescribed for the offence for which the offender has been convicted. It is further provided that even in a case where the amount of fine, to which the offender is liable, is unlimited, the same cannot be excessive.

14) In **Palaniappa Gounder vs. State of Tamil Nadu,** (1977) 2 SCC 634, the Supreme Court was dealing with a case in which the High Court after upholding the conviction had reduced the sentence from death to imprisonment for life and imposed a fine of Rs.20,000/. The Supreme Court, after considering the relevant provisions of the Indian Penal Code and the Criminal Procedure Code, observed that the courts have power to impose a sentence of fine and if fine is imposed on an offender, it cannot be challenged as contrary to law. It would be apt to reproduce the relevant excerpts of the said judgment as under:

> *"**9.** But legitimacy is not to be confused with propriety and the fact that the Court possesses a certain power does not mean that it must always exercise it. Though, therefore, the High Court had the power to impose on the appellant a sentence of fine alongwith the sentence of life imprisonment the question still arises whether a sentence of fine of Rs 20,000 is justified in the circumstances of the case. Economic offences are generally visited with heavy fines because an offender who has enriched himself unconscionably or unjustifiably by violating economic laws can be assumed legitimately to possess the means to pay that fine. He must disgorge his ill-gotten wealth. But quite different considerations would, in the generality of cases, apply to matters of the present kind. Though there is power to combine a sentence of death with a sentence of fine that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. In fact, the common trend of sentencing is that even a sentence of life imprisonment is seldom*

combined with a heavy sentence of fine. We cannot, of course, go so far as to express approval of the unqualified view taken in some of the cases that a sentence of fine for an offence of murder is wholly "inapposite" (see for example, State v. Pandurang Shinde [AIR 1956 Bom 711, 714 : 1956 Cri LJ 1306]) but before imposing the sentence of fine, particularly a heavy fine, alongwith the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circumstances of the case. As observed by this Court in Adamji Umar Dalal v. State of Bombay [1951 SCC 1106 : (1952) SCR 172 : AIR 1952 SC 14 : 1953 Cri LJ 542] determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations but the Court must always bear in mind the necessity of maintaining a proportion between the offence and the penalty proposed for it. ……."

15) Relying upon the aforesaid ratio, the Supreme Court has, in a subsequent case titled **Shahejadkhan Mahabubkhan Pathan vs. State of Gujarat,** (2013) 1 SCC 570, observed as under:

"12) It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be

harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases."

16) Again, the Supreme Court in the case of **Accused 'X' vs. State of Maharashtra,** (2019) 7 SCC 1, explained the policy relating sentencing in India in the following manner:

> ***"49.*** *Sentencing is appropriate allocation of criminal sanctions, which is mostly given by the judicial branch. [Nicola Padfield, Rod Morgan and Mike Maguire, "Out of Court, Out of Sight? Criminal Sanctions and No Judicial Decision-making", The Oxford Handbook of Criminology (5th Edn.).] This process occurring at the end of a trial still has a large impact on the efficacy of a criminal justice system. It is established that sentencing is a socio-legal process, wherein a Judge finds an appropriate punishment for the accused considering factual circumstances and equities. In light of the fact that the legislature provided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner. We need to appreciate that a strict fixed punishment approach in sentencing cannot be acceptable, as the Judge needs to have sufficient discretion as well.*
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> ***50.*** *Before analysing this case, we need to address the issue of the impact of reasoning in the sentencing process. The reasoning of the trial court acts as a link between the general level of sentence for the offence committed and to the facts and circumstances. The trial court is obligated to give reasons for the imposition of sentence, as firstly, it is a fundamental principle of natural justice that the adjudicators must provide reasons for reaching the decision and secondly, the reasons assume more importance as the liberty of the accused is subject to the aforesaid reasoning. Further, the appellate court is better enabled to assess the correctness of the quantum of punishment challenged, if the trial court has justified the same with reasons……."*

17) The Supreme Court in the case of **State of Madhya Pradesh vs. Udham and others,** (2019) 10 SCC 300, has, while relying upon the aforesaid observations, laid down that a detailed analysis of the facts of a case has to be undertaken at the time of deciding the question of sentence. In this regard, it would be apt to refer to the observations of

the Supreme Court made in paras 11 to 13 of the judgment which are reproduced as under:

> *"**11.** We are of the opinion that a large number of cases are being filed before this Court, due to insufficient or wrong sentencing undertaken by the courts below. We have time and again cautioned against the cavalier manner in which sentencing is dealt in certain cases. There is no gainsaying that the aspect of sentencing should not be taken for granted, as this part of Criminal Justice System has determinative impact on the society. In light of the same, we are of the opinion that we need to provide further clarity on the same.*
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> ***12.** Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).*
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> ***13.** Admittedly, we may note that under the crime test, seriousness needs to be ascertained. The seriousness of the crime may be ascertained by (i) bodily integrity of the victim; (ii) loss of material support or amenity; (iii) extent of humiliation; and (iv) privacy breach."*

18) In light of the foregoing analysis of law on the subject, it is clear that a criminal court, while deciding the quantum of sentence, has to analyse the facts peculiar to the case and impose appropriate sentence which is adequate, just, proportionate and commensurate with the nature and gravity of the crime and the manner in which the crime has

been committed. The sentencing lies entirely within the discretion of the Court but such discretion has to be exercised in a rational and judicious manner, on the basis of well-recognized principles which have evolved over a period of time. The object of sentencing has to be deterrence and correction and what should be the adequate sentence in a particular case would depend upon the facts and circumstances of each case. Some of the factors which a Court has to take into account while awarding sentence against an accused are the gravity of the crime, motive for the crime, nature of the offence and all other attending circumstances.

19) Coming to the facts of the instant case, the appellant has been convicted of causing death of a young student who must have been the only hope of his parents. A bright future was waiting in wings for the deceased but his life was cut short due to the act committed by the appellant, thereby leaving the parents of the young boy weeping and wailing for the rest of their lives. Appellant is a mature person, therefore, even if there would have been strong reasons for him to attack the deceased, still then, having regard to the young age of the deceased, he should have desisted from giving a fatal blow to the deceased. So, the circumstances in which the crime has been committed by the appellant do not warrant much leniency in the matter of imposing sentence upon him. The learned trial court has been considerate enough in not awarding maximum punishment to the appellant and instead imprisonment of only seven years has been awarded against him.

20) So far as the sentence of fine is concerned, the learned Senior counsel appearing for the appellant has submitted that the appellant was a teacher in a private school having a meagre income, as such, the imposition of fine of Rs.1.00 lac upon him is extremely harsh. In this regard it is to be noted that before passing the order of sentence, the learned trial court has conducted a summary enquiry as regards the social and economic background of the appellant/accused as well as of the victim. It is indicated in the impugned order of sentence that as per report of the Tehsildar, the appellant and his parents are owning movable and immovable property in the village and that he is a man of substance as per his social and economic background. In view of this and having regard to the nature and gravity of the offence, it cannot be stated that the amount of fine imposed upon the appellant is excessive. Apart from this, the learned trial court, while imposing the sentence of fine upon the appellant, has taken into consideration the requirement of paying compensation to the mother of the victim. Therefore, it cannot be stated that the amount of fine imposed upon the appellant is excessive in nature.

21) It has been contended by learned Senior counsel appearing for the appellant that the occurrence has taken place more than 11 years back and the appellant has faced trial for about four years and this appeal is pending for the last more than six years. According to the learned counsel, these factors constitute good enough ground to reduce the sentence imposed upon the appellant.

22) I am afraid the argument of learned counsel for the appellant cannot be accepted because mere protraction of trial or delay in hearing of appeal by itself is not a ground to reduce the sentence. I am supported in my aforesaid view by the judgment of the Supreme Court in the case of **Stat of Rajasthan vs. Banwari Lal and another,** 2022 LiveLaw (SC) 357. The Supreme Court in the said case was faced with an argument that the occurrence of the incident had taken place about 26 years ago, as such, the sentence of the convict deserved to be reduced. While repelling the said argument, the Supreme Court observed as under:

> *"9. In the matter on hand, it is proved that the victim Phool Chand has sustained a grievous injury on vital portion of body, i.e, head and there was a fracture on the skull. Doctor has also opined that the injury was life-threatening and the injury suffered by the injured Phool Chand was, in the ordinary course of nature, sufficient to cause death. As per Section 307 IPC, whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life or to such punishment as mentioned in Section 307 IPC. Thus, in the present case, the accused could have been sentenced to undergo life imprisonment and/or at least up to ten years. The learned trial Court sentenced the accused Banwari Lal to undergo three years rigorous imprisonment. Therefore, as such, the learned trial Court had already taken a very lenient view while imposing the sentence of only three years' rigorous imprisonment. Therefore, the High Court ought not to have interfered with the same. Though the High Court has not stated anything, from the impugned judgment and order passed by the High Court, it appears that what weighed with the High Court is the submission on behalf of the accused that the occurrence of the incident took place on 31.03.1989, i.e., about 26 years ago; that they were facing trial since last 26 years; and when the occurrence took place, they were young and now they are aged persons. The aforesaid cannot be the sole consideration while awarding an appropriate and/or adequate sentence. Even with regard to the submission on behalf of the accused that there is no minimum sentence under Section 307 IPC and that the sentence would be up to ten years, the same is answered by holding that discretion has to be exercised*

judiciously and the sentence has to be imposed proportionately and looking to the nature and gravity of the offence committed and by considering the principles for imposing sentence, referred to hereinabove.

10. Merely because a long period has lapsed by the time the appeal is decided cannot be a ground to award the punishment which is disproportionate and inadequate. The High Court has not at all adverted to the relevant factors which were required to be while imposing appropriate/suitable punishment /sentence. As observed hereinabove, the High Court has dealt with and disposed of the appeal in a most cavalier manner. The High Court has disposed of the appeal by adopting shortcuts. The manner in which the High Court has dealt with and disposed of the appeal is highly deprecated. We have come across a number of judgments of different High Courts and it is found that in many cases the criminal appeals are disposed of in a cursory manner and by adopting truncated methods. In some cases, the convictions under Section 302 IPC are converted to Section 304 Part I or Section 304 Part II IPC without assigning any adequate reasons and solely recording submissions on behalf of the accused that their conviction may be altered to Section 304 Part I or 304 Part II IPC. In cases, like the present one, the accused did not press any challenge to the conviction and prayed for reduction in sentence and the same is considered and an inadequate and inappropriate sentence has been imposed without assigning any further reasons and without adverting to the relevant factors which are required to be considered while imposing appropriate punishment/ sentence. We deprecate such practice of disposing of criminal appeals by adopting shortcuts. Therefore, the impugned judgment and order passed by the High Court reducing the sentence to the period already undergone (44 days) from three years rigorous imprisonment imposed by the learned trial Court in respect of accused Banwari Lal is absolutely unsustainable and the same deserves to be quashed and set aside."

23) From the foregoing analysis of law, it is clear that mere protraction in trial or delay in decision of the appeal cannot be a ground for reducing the sentence, particularly when during the pendency of the appeal, the appellant has been admitted to interim bail in terms of order dated 08.11.2016 and he continues to be on bail as on today.

24) For the foregoing reasons, I do not find any ground to interfere in the impugned judgment of conviction and order of sentence passed by the trial court. The appeal fails and the same is, accordingly,

dismissed. The appellant is directed to surrender before the trial court within a period of fifteen days from today and once the appellant surrenders before the trial court, he shall be sent to jail for serving the balance sentence.In case the appellant fails to surrender before the trial Court within the aforesaid period, the trial Court shall secure his presence through coercive measures and send him to jail for serving the balance sentence.

25) Trial court record along with a copy of this judgment be sent back.

(Sanjay Dhar)
Judge

SRINAGAR
09.05.2023
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes***
Whether the order is reportable: ***Yes***