

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: September 23, 2009*

+ **CRL.A. 215/2003**

VIJAY KUMAR @BANTI ..... Appellant  
Through: Mr.Deepak Sharma, Advocate.

versus

STATE OF NCT OF DELHI ..... Respondent  
Through: Ms.Richa Kapoor, A.P.P.

**CORAM:**

**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**

**HON'BLE MS. JUSTICE INDERMEET KAUR**

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

**PRADEEP NANDRAJOG, J.** (Oral)

1. Vide impugned judgment and order dated 31.1.2003, the learned Trial Judge has convicted appellant Vijay Kumar for the offence punishable under Section 376 IPC. The victim was a young girl named 'P' aged 6 years.

2. The process of law was set into motion when at around 4.00 PM on 26.6.2001 Arvind Kumar PW-1 the father of the victim called up at number 100 and informed the Police Control Room. The Police Control Room transmitted the said information to PS Model Town, where at 4.27 PM on 26.6.2001, an entry, being DD Number 12-A, Ex.PW-8/A was entered in

the daily diary register. DD No. 12-A records that a quarrel has taken place at Mauzi Wala Bagh, near Hans Cinema, near Ram Singh Hotel and that the information was received from telephone number 7461556.

3. SI Ashish Kumar PW-8 was entrusted with the investigation pertaining to said DD entry. Accompanied by Const.Sandeep Kumar PW-4 he reached the spot and met Arvind Kumar PW-1, who handed over accused Vijay Kumar to him. He i.e. SI Ashish Kumar recorded the statement Ex.PW-1/A of Arvind Kumar noting therein that he i.e. Arvind Kumar resides at Jhuggi No.N-21/A-10, Mauji Wala Bagh, Azadpur, Delhi with his daughter 'P' aged 6 years. That he is employed as a security guard with M/s. Rama Security having their office at Kotla Mubarakpur. Since his wife is no more, when he goes for work, his daughter 'P' stays alone at the jhuggi. That today, i.e. 26.6.2001 when he returned from work at around 3.45 PM, he saw Vijay Kumar @ Banti standing in his i.e. Arvind's jhuggi with the door closed. Vijay was without his trousers and was trying to remove the underwear of 'P'. On seeing Arvind, Vijay attempted to flee; however he i.e. Arvind managed to apprehend Vijay. 'P' soon after told him that Vijay had bit her on her cheek and attempted to commit wrong act on her.

4. On learning this, SI Ashish Kumar summoned a lady Const.Sunita PW-3 at the spot. On her arrival, SI Ashish Kumar

alongwith Const. Sandeep and Ct. Sunita took the appellant Vijay and prosecutrix 'P' to Hindu Rao Hospital for their medical examination. SI Ashish Kumar collected MLC Ex.PW-8/A of 'P' as per which, on external examination, no injury could be found on her genetalia or thighs; only a linear scar of 1½" was found on her right forearm. Dr.Vandana Sharma (not examined as witness) who prepared the MLC advised that the patient be taken to a gynecologist for detailed examination. Accordingly, she i.e. Kumari 'P' was taken to Dr.Sangeeta Chaudhary PW-9 who prepared her report Ex.PW-9/A and opined that the hymen was freshly torn and the vagina admitted only tip of little finger. Dr.Sangeeta handed over slides of vulval discharge of 'P' to Ct. Sunita who seized them as recorded in the memo Ex.PW-3/A. SI Ashish Kumar also collected MLC Ex.PW-8/B of appellant Vijay which recorded absence of any external injuries on the genetalia of appellant but a few abrasions on his chest. Smegma was found absent. The appellant was referred to be taken to Medico Legal Expert, who on examination opined that there was nothing to suggest that appellant is not capable of performing sexual intercourse.

5. SI Ashish Kumar then made endorsement Ex.PW-8/C on the statement Ex.PW-1/A of Arvind Kumar and handed it over to Const.Sandeep who took it to PS Model Town for registration of an FIR. At PS Model Town, at 12.25 AM on

27.6.2001 ASI Vinod Kumar PW-5 recorded an FIR Ex.PW-5/A for the offence punishable under Section 376/511 IPC.

6. In the meantime, accompanied by Arvind Kumar, 'P', Ct. Sunita and appellant Vijay, SI Ashish Kumar returned to the spot from the hospital. At the instance of Arvind Kumar PW-1, he prepared site plan Ex.PW-8/D of the spot. On the return of Ct. Sandeep with a copy of the FIR, SI Ashish Kumar formally arrested appellant Vijay as recorded in memo Ex.PW-3/C and recorded his disclosure statement Ex.PW-3/D. In the presence of Ct. Sandeep, he seized the pant Ex.P-1 of the appellant as recorded in memo Ex.PW-4/A and also the frock Ex.P-2 and underwear Ex.P-3 worn by 'P' at the time of the occurrence as recorded in memo Ex.PW-4/B.

7. Since 'P' was aged only 6 years at the time of offence, the investigating officer moved an application Ex.PW-8/E before a Metropolitan Magistrate for recording her statement under section 164 Cr.P.C. and on the date fixed therefor i.e. 29.6.2001, got recorded her statement Ex.PW-2/A. Said statement of 'P' records that on the day of the incident when 'P' was at her house, Vijay entered and gave her rupees five. She however threw the same, on which Vijay bit her on her cheek and took off his pant. Vijay then tried to remove her underwear when her father arrived there. On seeing her father

Vijay attempted to run but was caught. Then police arrived and carried out the investigation.

8. The pant of the accused, the frock and underwear as also the vulval discharge of the prosecutrix were sent for forensic examination, however, no blood or semen could be detected on any of the said articles as recorded in FSL report Ex.PW-8/G.

9. A charge for the offence punishable under Section 376/511 IPC was framed against Vijay. He was put to trial. The prosecution examined 9 witnesses. PW-6 and PW-7 are formal witnesses. PW-8 is the investigating officer SI Ashish Kumar. PW-3 and PW-4 were the two constables assisting SI Ashish Kumar. PW-5 recorded the FIR and PW-9 is the Gynecologist who examined the prosecutrix. PW-1 being the father of the victim and PW-2 being the victim herself, everything turns on their testimonies.

10. Arvind Kumar PW-1 deposed that he was employed with Rama Security Kotla Mubarakpur, Delhi. His wife died in 1995 and since then when he used to go for his work, his daughter 'P' used to stay alone at their jhuggi. On the day of the incident, when at around 4.00 PM he returned from his duty and was present at the tea shop outside his house, he heard cries coming from his house. He immediately rushed and found appellant Vijay there in a naked condition without

his trousers, trying to remove the underwear of his daughter 'P'. On seeing him, Vijay tried to flee. But with the help of neighbours, who had also in the meantime collected there, he i.e. Arvind apprehended Vijay. 'P' had a cut on her cheek which she informed him was because Vijay bit her. He informed the police of the occurrence. On being cross-examined he stated that he knew Vijay as he resided in the neighbourhood. That between the tea shop where he was at that time and his house, there is only one wall.

11. 'P' PW-2 deposed that at the time of the incident she was studying in class three. It was summer time, and she was present in her house when appellant Vijay who resides in the neighbourhood came there. Her father was then sitting at the tea shop outside. Vijay gave her five rupees and asked her to do wrong act with him. When she refused and returned the money, he closed the door, laid her on the bed and bit her cheek. He removed her i.e. 'P's frock and underwear as well as his own pant. He laid himself on her. On this she started screaming because of which her father and other neighbours reached there. Vijay tried to escape but her father apprehended him. Police reached soon thereafter.

12. Dr.Sangeeta Chaudhary PW-9 deposed that on 26.6.2001, she examined 'P' and found her hymen freshly torn. Since this evidence showed that 'P' was subject to sexual

intercourse, a charge for the offence punishable under Section 376 IPC was framed on 27.1.2003. Since the charge was altered, an opportunity to recall the witnesses who were examined till then was given to the accused, who chose to summon only PW-9 for further cross-examination. Accordingly, PW-9 was recalled for further cross-examination, but on the next date of hearing i.e. 30.1.2003, the accused, through his counsel stated that he does not intend to further cross-examine PW-9.

13. Vide impugned judgment and order dated 31.1.2003, the learned Trial Judge has convicted appellant Vijay for the offence punishable under Section 376 IPC. The learned Trial Judge has held that the testimony of PW-9 and the report Ex.PW-9/A conclusively established that Kumari 'P' was subjected to sexual intercourse. Relying on the testimonies of PW-1 and PW-2, the learned Trial Judge has held that it was unbelievable that either the prosecutrix herself or her father would implicate the accused falsely and thereby let go off the real culprit, especially where no motive to do so on their part has been assailed by the prosecution, much less proved.

14. The appellant has been sentenced to undergo imprisonment for life. The learned Trial Judge has imposed the

maximum sentence on account of the reason the victim being a minor.

15. Learned counsel for the appellant contends that neither Kumari 'P' nor her father has deposed that Kumari 'P' was raped. Thus, counsel urges that at best the evidence suggests an attempt to rape.

16. If we peruse the testimony of Kumari 'P' we note that she has categorically stated that after stripping her, the appellant took off his pant and lay down on top of her. Kumari 'P' is too young to understand what actually happened to her. But what happened to her is evidenced by the testimony of PW-9 and the report Ex.PW-9/A which shows that Kumari 'P's' hymen was torn. Kumari 'P' has not said that the appellant inserted his finger into her vagina. It is not the case of the appellant that he committed digital rape. Thus, we concur with the view taken by the learned Trial Judge that the evidence establishes Kumari 'P' being raped.

17. On the issue of sentence we find that a Division Bench of this Court, in the decision reported as 2008 (4) JCC 2497 *Khem Chand vs. State of Delhi*, has extensively noted the sentencing policy in relation to the victim being a minor. It was held that notwithstanding rape being a serious offence, mechanically, the highest sentence i.e. of life imprisonment should not be imposed.

18. We note that the legislature has provided for stiffer sentence in case of child rape; the maximum being up to life imprisonment. The minimum sentence prescribed is ten years' imprisonment. Thus, a safe method of sentencing would be to apply the minimum and if aggravating circumstances are found, to impose the higher sentence. Mitigating circumstances of the offender being a first time offender and of young immature age have also to be considered. Aggravating circumstances would be violence committed while subjecting the victim to rape; position of trust betrayed and possibility of recidivism i.e. repeat offending.

19. The appellant was a young boy aged a little above 18 years when he committed the offence. The age has been noted by the learned Trial Judge as 18 years in the order imposing sentence. There is no history of the appellant being a previous convict. The victim has not been brutalized. Thus, we hold that the appropriate sentence to be awarded is to undergo imprisonment for ten years.

20. Dismissing the appeal insofar it lays a challenge to the order of conviction, we modify the order of sentence dated 31.1.2003 and set aside the sentence of imprisonment for life. We sentence the appellant to undergo imprisonment for ten years. The appellant would be entitled to the benefit of Section 428 Cr.P.C.

21. The appeal stands disposed of in terms of para 20 above.

22. Copy of this order be sent to the Superintendent, Central Jail, Tihar for compliance.

**(PRADEEP NANDRAJOG)**  
**JUDGE**

**(INDERMEET KAUR)**  
**JUDGE**

**September 23, 2009**  
Dharmender