

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

% *Date of Decision: 9th October, 2009*

+ **CRL.A. 958/2006**

DILSHAD Appellant

Through : Ms. Purnima Sethi, Advocate

versus

STATE OF NCT OF DELHI Respondent

Through : Mr. M.N.Dudeja, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J. (Oral)

1. Dilshad, the appellant has been convicted for the offence of having raped Kumari 'S' and has been sentenced to undergo imprisonment for life. He has also been convicted for the offence punishable under Section 363 IPC, for which offence he has been directed to undergo imprisonment for one year. He has also been convicted for the offence punishable under Section 366 IPC, for which offence he has been sentenced to undergo imprisonment for 10 years.

2. As per the evidence on record, Kumari 'S' was aged

9 years when the offence was committed.

3. In returning the findings of guilt, the learned trial Judge has, with reference to the MLC, Ex.PW-10/A of Kumari 'S' as also the testimony of Dr.Ruchika PW-10, concluded that the same evidences Kumari 'S' being subjected to a penetration.

4. With reference to the testimony of Kumari 'S', who appeared as PW-2, the learned trial Judge has held that the so called blemishes and embellishments and improvements in her testimony, pointed out to him, were trivial and that Kumari 'S' has spoken the truth. Since Kumari 'S' nailed the appellant as her tormentor, finding returned is that the testimony of Kumari 'S' establishes that the person who subjected Kumari 'S' to a sexual intercourse was the appellant who enticed her i.e. removed her from the lawful custody of her parents.

5. Though not referred to by the learned trial Judge, the MLC Ex.PW-9/A of the appellant shows and proves that the appellant is capable of performing sexual intercourse.

6. In returning the sentence of imprisonment for life for the offence of rape, the reason given by the learned trial Judge is that Kumari 'S' was a minor and that a sexual offence against a minor warrants a sentence of imprisonment for life.

7. We have heard learned counsel for the appellant and have perused the record.

8. We have perused the testimony of Kumari 'S' and note that within the constraints of her age and socio-economic background, the minor deviations in her testimony vis-à-vis her initial statement to the police have to be ignored.

9. We see no reason why Kumari 'S' would falsely implicate the appellant. Kumari 'S' has successfully withstood the test of cross-examination and has clearly brought out the fact that the appellant had subjected her to a forcible sexual intercourse after enticing her away from the lawful custody of her parents.

10. Thus, we concur with the view taken by the learned trial Judge in the impugned decision dated 27.10.2005 that the appellant has committed rape on Kumari 'S' and has committed an offence punishable under Section 363 IPC.

11. However, we are left wondering as to how has the appellant been convicted for the offence punishable under Section 366 IPC. There is no evidence that Kumari 'S' was kidnapped with the intent of compelling her to a person against her wish or to force her or seduce her to illicit intercourse. Indeed, learned counsel for the State concedes that there is just no evidence to convict the appellant for the offence punishable under Section 366 IPC.

12. We accordingly set aside the conviction of the

appellant as also the sentence for the offence punishable under Section 366 IPC.

13. We maintain the conviction of the appellant for the offence punishable under Section 376 IPC and Section 363 IPC.

14. However, we reduce the sentence imposed upon the appellant for the offence punishable under Section 376 IPC from imprisonment for life to undergo imprisonment for 7 years. We maintain the sentence of imprisonment for one year pertaining to the offence punishable under Section 363 IPC. Needless to state, both sentences shall run concurrently. The appellant shall be entitled to the benefit of Section 428 Cr.P.C.

15. Our reason for reducing the sentence to undergo imprisonment for 7 years for the offence of rape pertaining to Kumari 'S' is that it is permissible for a Court, after giving adequate and special reasons to impose a sentence for a term less than 10 years, but not less than 7 years, when the victim is a child under 12 years of age.

16. The reason why we are reducing the sentence is that this is the solitary offence committed by the appellant and that his wife is suffering from cancer, a fact got verified through learned counsel for the State when the appellant was granted interim bail vide order dated 8.4.2009 and the

additional fact that the appellant has 4 minor children, 3 of whom are girls aged less than 11 years. The wife of the appellant is breathing her last and the 4 minor children are virtually in a state of starvation. The appellant is the sole bread earner of his family.

17. Since the appellant is in jail, copy of this order be sent to the Superintendent Central Jail Tihar for compliance and to be made available to the appellant.

PRADEEP NANDRAJOG, J.

SURESH KAIT, J.

**OCTOBER 09, 2009
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