

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

% *Date of Decision : July 24, 2009*

+ **CRL. APPEAL NO.859/2008**

TAPAN BISWAS ...Appellant.
Through : Mr. Rajesh Mahajan, Advocate

VERSUS

STATE ...Respondent
Through : Mr. Pawan Sharma, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

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

PRADEEP NANDRAJOG, J. (ORAL)

Crl.M.B.No.840/2009

Learned counsel for the appellant states that if this Court would hear the appeal today itself, he would not press the applications seeking suspension of sentence. Learned counsel for the State responds that let the appeal be heard today itself.

Crl.M.B.No.840/2009 is accordingly dismissed as infructuous since the appeal itself is being heard for disposal

and prayer made in the application is to suspend the sentence imposed upon the appellant till the appeal is heard.

Crl.A.No.859/2008

1. The appellant has been convicted for the offence of having raped Kumari 'K'. Vide order dated 15.12.2007 he has been sentenced to undergo imprisonment for life and pay compensation in sum of Rs.25,000/- to the victim for the offence of rape.

2. In view of the MLC Ex.PW-1/A of Kumari 'K' and the testimony of Dr.Pankaj PW-1 who had examined Kumari 'K' at 11:00 PM on 15.6.2004 as also Ex.PW-14/A and Ex.PW-15/B-1 to Ex.PW-15/B-7 and the testimony of Dr.Swati Devikar PW-15 wherefrom it is apparent that Kumari 'K' was raped and had suffered a vaginal tear, learned counsel for the appellant concedes that there is clinching evidence to establish that Kumari 'K' was subjected to a sexual assault on 15.6.2004.

3. Thus, two questions need consideration in the appeal. Firstly, whether the finding returned by the learned Trial Judge that the appellant is the perpetrator of the crime is correct; and secondly, whether the sentence of imprisonment for life imposed is excessive and the sentence needs corrective action. Needless to state, the second question

needs to be addressed and answered depending upon the answer to the first question.

4. This takes us straight away to the testimony of the child witness Kumari 'K' who was examined as PW-3.

5. When she deposed in Court on 29.11.2004, Kumari 'K' was aged 10 years and after putting questions to her and eliciting the response, the learned Trial Judge has recorded a satisfaction that Kumari 'K' is capable of understanding the questions put to her. Thereafter, Kumari 'K' has been examined. She deposed that the appellant was known to her being a neighbour. Her bhabhi had brought her to Delhi from the village and had to go to the village as her father had died and she had stayed in the house of the appellant for about a month. Her bhabhi returned from the village about a month prior to the incident and she went back to the house of her bhabhi. On 15.7.2004 she went to the temple and met the appellant who told her that her bhabhi was calling her home. The appellant took a short cut from the park and inside the park pushed her on the ground and removed her frock and underwear. He inserted two fingers in her private parts and thereafter removed his pant and committed rape. He left her threatening her not to disclose the incident to anyone. On reaching home she told her bhabhi who took her to the hospital.

6. Kumari 'K' was cross examined and a suggestion was put to her that she was employed by the appellant and pertaining to a dispute qua wages she was falsely implicating the appellant. Kumari 'K' denied the suggestion.

7. We may note that nothing has been pointed out to us with reference to the cross examination of Kumari 'K' wherefrom it can be said that Kumari 'K' is telling a lie.

8. Konika Biswas PW-4, the bhabhi of Kumari 'K' deposed that Kumari 'K' is the daughter of her paternal uncle and she had brought him to Delhi. When her father died she left for the village and at the request of the wife of the appellant left Kumari 'K' in their house. She returned to Delhi about a month prior to the date of incident and brought back Kumari 'K' to her house. At around 7:30 PM, on 15.6.2004, Kumari 'K' left for the temple and at about 9:00 PM Kumari 'K' returned with blood oozing from her private parts. Kumari 'K' disclosed that the appellant had raped her. She took Kumari 'K' to the hospital. Police was informed of the incident and she and Kumari 'K' gave statements before the police.

9. We may note that the FIR Ex.PW-6/A has been registered at 2:20 AM i.e. during the intervening night of 15th and 16th June, 2004. The FIR names the appellant as the accused.

10. The testimony of Kumari 'K' and her bhabhi establish the accomplicity of the appellant and defence of false implication is but a theory propounded/projected by the appellant.

11. To reassure ourselves we have perused Ex.PW-4/A the statement of PW-4 recorded by the IO pursuant where to the FIR was registered. The same evidences that the statement of PW-4 was recorded at the hospital and was dispatched to the police station at 2:00 in the night and FIR was registered at 2:20 in the night. In her statement Ex.PW-4/A the appellant has been named as the perpetrator of the crime. So soon after the incident has the appellant been named that it renders highly improbable of his being falsely implicated.

12. We concur with the view taken by the learned Trial Judge that the evidence establishes the guilt of the appellant.

13. On the issue of imposing a sentence, we note that a Co-ordinate Bench of this Court had discussed the sentencing policy. The decision is reported as 2006 (1) JCC 404 Jagdish Vs. State. The said decision and another decision reported as 2007 (97) DRJ. 403 Virender Nanda Vs. State was noted by another Division Bench of which one of us namely Pradeep Nandrajog, J. was a member of. In the said decision dated

23.3.1999 in Crl.A.No.335/2005 Prabhu Nath Vs. State it was observed as under:-

“6. The penal code prescribes the maximum punishment for rape as imprisonment for life. Thus, the legislative intent is that in extreme cases of rape sentence to be imposed should be of imprisonment for life. Obviously, in cases less than the extreme, the sentence has to be less. What would be the instances of extreme cases of rape? First and foremost would be the acts of brutality which may accompany a rape. The second would be the trauma inflicted, other than the trauma of rape, for example where the rape victim is beaten or threatened with death, is battered etc. The third would be where the offender is in a dominating position and breaches the confidence of a victim for example, in near relation of the victim being the offender.

7. Lack of previous criminal record is also a mitigating factor.

8. Noting that the appellant has no previous criminal record and was aged about 19 – 20 years at the time of the crime being committed, we are of the opinion that the sentence of imprisonment for life imposed upon the appellant needs to be reduced to rigorous imprisonment for 10 years.

9. In the decision reported as 2006 (1) JCC 404 Jagdish Vs. State, the prosecutrix was aged 11 years and the accused was a youth aged 19 years. Sentence to undergo imprisonment for life was reduced to 10 years and a fine of Rs.30,000/-; in default of payment of fine to undergo simple imprisonment for one year. In the decision reported as 2007 (97) DRJ 403 Virender Nanda vs State, the prosecutrix was aged 6 years and the accused was a youth, but age not recorded. Sentence to undergo imprisonment for life was reduced to 10 years and a fine of Rs.10,000/-; in default of payment of fine to undergo simple imprisonment for two years.

10. We accordingly dispose of the appeal maintaining the conviction of the appellant but modifying the sentence awarded and direct that the appellant shall undergo rigorous imprisonment for a

period of 10 years and shall pay a fine of Rs.30,000/-. The fine, if realized, shall be paid over to the victim. If the fine is not paid, the appellant shall undergo simple imprisonment in default of payment of fine for a period of two years.”

14. Noting the young age of the appellant and adopting the reasoning in Prabhu Nath's case (supra), we dispose of the appeal sustaining the conviction of the appellant but reduce the sentence for the offence punishable under Section 376 IPC from imprisonment of life to undergo rigorous imprisonment for a period of 10 years. The compensatory fine imposed upon the appellant is maintained. The sentence for the offence under Section 506 IPC, which needless to state runs concurrently, is sustained.

15. Copy of this decision be sent to the Superintendent Central Jail Tihar who is directed to hand over the same to the appellant and also make necessary corrections in the jail record.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

July 24, 2009
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