

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

% Reserved on: 18th October, 2022
Decided on: 3rd November, 2022

+ **CRL.A. 517/2019**

VINOD KUMAR Appellant
Represented by: Mr. Sumit Choudhary, Advocate
DHCLSC with appellant in custody.

versus

STATE Respondent
Represented by: Ms. Shubhi Gupta, APP for State with
WSI Arti, PS Vasant Kunj South.

+ **CRL.A. 556/2019**

HANUMAN MISHRA Appellant
Represented by: Mr. S.K. Sethi, Adv. with appellant in
custody.

versus

STATE Respondent
Represented by: Ms. Shubhi Gupta, APP for State with
WSI Arti, PS Vasant Kunj South.

+ **CRL.A. 562/2019 & CRL. M.A. 8933/2019**

PARVEEN KUMAR Appellant
Represented by: Mr. Madhav Khurana, Mr. Samarth
K. Luthra, Advs. with appellant in
custody.

versus

STATE Respondent
Represented by: Ms. Shubhi Gupta, APP for State with
WSI Arti, PS Vasant Kunj South.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL
MUKTA GUPTA, J.

1. By the present appeals the appellants challenge the impugned judgment dated 15th December, 2018 whereby appellant Hanuman Mishra was convicted for offences punishable under Section 366 and 376 IPC whereas appellants Parveen Kumar and Vinod Kumar were convicted for offences punishable under Section 366 IPC read with 34 IPC and Section 376(2)(g) IPC. Vide the order on sentence dated 15th December, 2018 appellant Hanuman Mishra was awarded imprisonment for life and a fine of ₹1 lakh for offence punishable under Section 376 IPC and rigorous imprisonment for a period of 10 years and a fine of ₹50,000/- in default whereof to undergo six months simple imprisonment for offence punishable under Section 376 IPC. Appellants Parveen Kumar and Vinod Kumar were awarded imprisonment for life for offence punishable under Section 376(2)(g) IPC and to pay a fine of ₹1 lakh each and rigorous imprisonment for a period of 10 years and a fine of ₹50,000/- in default whereof to undergo six months simple imprisonment for offence punishable under Section 366 read with 34 IPC.

2. Case of the prosecution is based on the testimony of PW-1 the prosecutrix who lodged the FIR exhibited vide Ex.PW-1/A on 9th April, 2011 at 10.15 AM stating that she was residing in Uttar Pradesh. Her family had a house in Faridabad and she was studying in class 10th. Two months prior her father suffered an injury, since when she and her mother joined her father at Faridabad. She has an elder brother who got married 4 – 5 years ago to the daughter of Hanuman Mishra. Hanuman Mishra was presently

residing at Rangpuri village in a rented accommodation and her brother's wife i.e. daughter of Hanuman Mishra was presently residing at the village. On 7th April, 2011 Hanuman Mishra and his wife Lalita came to their house at Faridabad. On 8th April, 2011 when Hanuman Mishra was going back, he said to her father that his company was giving gifts to the girls and the victim should accompany her as his daughter so that he could get a gift for her from his company. Since Lalita, the wife of Hanuman was unwell, she continued to stay with the victim's parents. After reaching Rangpuri, the victim came to know that Hanuman Mishra brought her on a false pretext to his house. He got her a suit and told her that if there is a phone call, she should tell that she has got the gift. She asked Hanuman Mishra to drop her at her residence, on which he stated that he was tired and will drop her next day. After dinner she fell asleep, when Hanuman Mishra came to her and started sexually harassing her. He put perfume on her and touched her. He took off her clothes and committed rape on her. When she protested, Hanuman Mishra stated that she should not tell these facts to anybody. At night she left the house secretly, as she was scared. While she was walking, she saw an Indica CAR. The boy who was driving the Indica CAR told his name as Bijender, S/o of Jagbir Singh, R/o village Barona, Thana Kharkoda, District Sonipath, Haryana. When he offered to help her, she got into his Indica car when two other boys also sat in the said car. Thereafter, driver Bijender started taking the car towards jungle at Dwarka and stopped over there. When she asked the driver, about the reason to stop the car, he started evading the answer. The two boys sitting at the back started misbehaving with her and when she objected, they assaulted her. One of the two boys got down and then the other boy forcibly raped her on the rear seat of the car.

Thereafter, the other boy came and forcibly raped her as well. When the second boy was committing sexual assault on her, she complained of stomach ache and that she had to go for urination. On this pretext she got down from the car and started running. The driver followed her and caught hold of her because of which she fell down and suffered injuries on her knees. The driver also fell down and suffered injuries on the knees. Hearing the noise one car stopped and called the PCR van, when the PCR van took her and the driver to the Police Station. However, his two associates succeeded in running away. She could identify the two associates who were aged 20 – 25 years, well-built, height 5 feet 8 inches approximately on seeing them. She gave the number of the car as DL-1YB-4850.

3. During the course of investigation Hanuman Mishra and the two other boys, namely, Parveen Kumar and Vinod Kumar were arrested and after investigation charge-sheet was filed against them. During trial, prosecution examined 23 witnesses. Statements of the accused were recorded under Section 313 Cr.P.C., however they led no defence evidence. Besides the appellant Bijender Dahiya @ Bije, the driver who was arrested at the spot during the course of trial was released on interim bail who absconded and was declared a proclaimed offender and thus proceedings against him have been kept in abeyance. Hence, the present appeals by the three appellants challenging the impugned judgment of conviction and order on sentence.

4. The three appeals were listed for final hearing on 1st September, 2022 when learned counsel for the appellant Vinod Kumar prayed that in terms of direction (c) and (d) in page 11 of the order dated 6th October, 2021 passed by the Hon'ble Supreme Court in SLP (CRL) No. 529/2021 titled as "Sonadhar Vs. State of Chattisgarh" this Court is required to consider

releasing the appellants on the period already undergone. This Court noted the directions (c) and (d) in the said decisions and as learned counsel for the appellant prayed that appellants be directed to be produced in custody so that the appellants can take an informed decision and give necessary instructions to the learned counsels, production warrants of the appellants were issued returnable for 20th September, 2022. On 20th September, 2022 the three appellants expressed remorse on the infraction committed by them, however prayed that they be released on the period already undergone in view of the decision in Sonadhar Vs. State of Chattisgarh, when this Court called for the latest nominal roll of the three appellants.

5. On 18th October, 2022 though learned counsels for Parveen Kumar and Hanuman Mishra have addressed arguments both on merits as well as in the alternative sought relaxation in the sentence which arguments will be dealt later, learned counsel for the appellant Vinod Kumar again insisted that the appeal of Vinod Kumar be decided in terms of the decision of Hon'ble Supreme Court in Sonadhar (supra) and prays that the remaining sentence of the appellant be remitted by this Court.

6. Before dealing with the merits of the case, it would be thus appropriate to deal with the prayer made by learned counsel for the appellant Vinod Kumar. Hon'ble Supreme Court vide the order dated 6th October, 2021 in Sonadhar (supra) first issued directions in relation to convicts whose appeals were pending before the Hon'ble Supreme Court and then taking up SLP (CRL) No. 514/2021 with the sub-heading "*Appeals pending before the High Courts which are being looked after by the High Court Legal Services Committee*" passed the following directions:

“SLP(CRL.) NO. 514/ 2021

**APPEALS PENDING BEFORE THE HIGH COURTS
WHICH ARE BEING LOOKED AFTER BY THE HIGH
COURT LEGAL SERVICES COMMITTEES :**

Mr. Devansh A. Mohta, learned Amicus Curiae presented the aspects arising from appeals pending before the High Courts which are being looked after by the High Court Legal Services Committee. A detailed exercise was undertaken with the Secretary, Delhi High Court Legal Services Committee on account of data and proximity and a list of all criminal appeals, where accused is in custody, pending in the Delhi High Court and being looked after by the High Court Legal Services Committee was prepared and a chart shared with the NALSA.

What emerges from the chart is that in 232 such cases fixed term sentences have been imposed ranging from 3 years to 20 years while the remaining 129 cases are life sentence cases. In fixed term sentences, the accused in some cases has undergone more than half the sentence, if not more, similarly in some life sentence cases, the accused has undergone custody for more than 10 years.

The other High Court where this aspect has been explored is the Chhattisgarh High Court, more so, in the context of the reliance placed by Mr. Mohta on rule 149 of the High Court of Chhattisgarh as recorded in the Order dated 07.07.2021. It is in view thereof certain suggestions have been made and we have heard learned counsel for parties. We are in broad agreement with these suggestions and would seek to expand on the same.

We thus issue the following directions:

a) A similar exercise be undertaken by the High Court Legal Services Committee of different High Courts so that convicts represented by legal aid Advocates do not suffer due

to delay in hearing of the appeals. NALSA will circulate this order to the concerned authority and monitor the exercise to be carried on.

b) The Delhi High Court Legal Services Committee would take up the cases of those convicts who have undergone more than half the sentence in case of fixed term sentences and examine the feasibility of filing bail applications before the High Court, while in case of 'life sentence' cases, such an exercise may be undertaken where eight years of actual custody has been undergone.

c) We are of the view that in fixed term sentence cases, an endeavor be made, at least as a pilot project, in these two High Courts to get in touch with the convicts and find out whether they are willing to accept their infractions and agree to disposal of the appeals on the basis of sentence undergone.

d) A similar exercise can be undertaken even in respect of 'life sentence' cases where the sentenced persons are entitled to remission of the remaining sentence i.e., whether they would still like to contest the appeals or the remission of sentence would be acceptable to such of the convicts.

Our aforesaid additional directions are based on a premise that at times if a convict has actually done of what he is accused of and he is remorseful, he may be willing to accept his acts and suffer a lesser sentence. We make it clear that the objective is not to compel or extract acceptance from such convicts depriving of the right of appeal."

7. Undoubtedly, the three appellants before this Court are represented by the Delhi High Court Legal Services Committee, however the issue before this Court is whether the appeals can be decided based on the concession given by the appellants and directions can be issued to remit the remaining sentence of the appellant Vinod Kumar or even the other appellants without deciding the appeal on merit. It is trite law that the present are first appeals

by the convicts exercising their statutory right challenging their conviction and order on sentence which is required to be heard both on facts and law as ordained under Section 374 Cr.P.C.

8. In SLP (CRL) 8234/2012 titled as 'Jeetu @ Jitendra & Ors. Vs. State of Chattisgarh' decided on 4th December, 2012 dealing with the issue whether the High Court in an appeal under Section 374 Cr.P.C. without going into the merits of the conviction, based on a concession by the learned counsels for convicts, can prefer to argue merely on the sentence, it was held as under:

“15. The hub of the matter, as we perceive, really pertains to the justifiability and legal propriety of the manner in which the High Court has dealt with the appeal. It is clear as day that it has recorded the proponentment of the learned counsel for the appellants relating to non-assail of the conviction, extenuating factors for reduction of sentence and proceeded to address itself with regard to the quantum of sentence. It has not recorded its opinion as regards the correctness of the conviction.

16. The learned counsel for the appellants has made an effort to question the pregnability of the conviction recorded by the learned trial Judge on many a score. But, a significant one, the conclusion is sans delineation on merits. We are required to address whether deliberation on merits was the warrant despite a concession given in that regard by the learned counsel for the appellants. Section 374 of the Code of Criminal Procedure, 1973 (for short “the Code”) deals with appeals from conviction. Section 382 of the Code deals with petition of appeal. Section 384 of the Code deals with summary dismissal of appeal. A three Judge Bench in Dagadu v. State of Maharashtra¹ referred to the decisions in Govinda Kadtuji Kadam and others v. The State of Maharashtra and Sita Ram and others v. The State of Uttar Pradesh and thereafter opined that even if the High Court chooses to dismiss the appeal summarily, some brief reasons should be given so as to enable

this Court to judge whether or not the case requires any further examination. If no reasons are given, the task of this Court becomes onerous inasmuch as this Court would be required to perform the function of the High Court itself by reappraising the entire evidence resulting in serious harassment and expense to the accused.

17. It is apt to note that sometimes the accused enters into a plea bargaining. Prior to coming into force of Chapter 21 A dealing with plea bargaining under Sections 265 A and 265 L by Act 2 of 2006, the concept of plea bargaining was not envisaged under the Code. In Thippaswamy v. State of Karnataka, the accused pleaded guilty and was eventually convicted by the learned Magistrate under Section 304 A of the IPC and was sentenced to pay a sum of Rs.1000/- towards fine. He did not avail the opportunity to defend himself. On an appeal preferred by the State, the High Court found him guilty maintaining the sentence of fine and additionally imposed a substantive sentence of rigorous imprisonment for a period of one year. A three Judge Bench of this Court took note of the fact that it was a case of plea bargaining and observed that had the accused known that he would not be let off with a mere sentence of fine but would be imprisoned, he would not have pleaded guilty. In that context, this Court observed as follows:-

“It would be clearly violative of Article 21 of the Constitution to induce or lead an accused to plead guilty under a promise or assurance that he would be let off lightly and then in appeal or revision, to enhance the sentence. Of course when we say this, we do not for a moment wish to suggest that the Court of appeal or revision should not interfere where a disproportionately low sentence is imposed on the accused as a result of plea-bargaining. But in such a case, it would not be reasonable, fair just to act on the plea of guilty for the purpose of enhancing the sentence. The Court of appeal or revision should, in such a case, set aside the conviction and sentence of the accused and remand the case to the trial court so that the accused can, if he so wishes, defend himself against the charge and if he is

found guilty, proper sentence can be passed against him.”

After so holding, the conviction was set aside and the matter was sent back to the trial Magistrate with a direction that the accused shall be afforded a proper and adequate opportunity to defend himself. It was further ruled that if he was guilty as a result of the trial, the judicial Magistrate may impose proper sentence upon him and, on the other hand, if he is not found guilty, he may be acquitted.

18. *As is evincible from the impugned judgment, the learned counsel for the appellants before the High Court did not challenge the conviction but sought imposition of a lenient sentence. In State of Uttar Pradesh v. Chandrika , the High Court in an appeal accepted the plea bargain and maintained the conviction of the respondent under Section 304 Part 1 of I.P.C but altered the sentence to the period of imprisonment already undergone and to pay a fine of Rs. 5000/-, in default of payment, to suffer R.I. for six months. Be it noted, the High Court had not stated the actual period of imprisonment undergone by the respondent therein. This Court took note of the judgment and order of conviction and sentence passed by the learned sessions Judge who had convicted him under Section 304 Part I of I.P.C and sentenced him to undergo eight years’ R.I. At the time of hearing of appeal, the finding of conviction was not challenged with a view to bargain on the question of sentence. The learned single Judge accepted the bargain and partly allowed the appeal by altering the sentence. The legal acceptability of the said judgment was called in question by the State before this Court. Taking note of the fact situation, this Court observed that the concept of plea bargaining is not recognized and is against public policy under the criminal justice system. After referring to the decisions in Madanlal Ramchandra Daga v. State of Maharashtra , Murlidhar Meghraj Loya v. State of Maharashtra , Ganeshmal Jashraj v. Govt. of Gujarat and Thippaswamy (supra), a two-Judge Bench ruled thus:-*

“It is settled law that on the basis of plea bargaining the court cannot dispose of the criminal cases. The Court has

to decide it on merits. If the accused confesses his guilt, an appropriate sentence is required to be imposed. Further, the approach of the court in appeal or revisions should be to find out whether the accused is guilty or not on the basis of the evidence on record. If he is guilty, an appropriate sentence is required to be imposed or maintained. If the appellant or his counsel submits that he is not challenging the order of conviction, as there is sufficient evidence to connect the accused with the crime, then also the court's conscience must be satisfied before passing the final order that the said concession is based on the evidence on record. In such cases, sentence commensurating with the crime committed by the accused is required to be imposed. Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty the sentence be reduced.”

[Emphasis Supplied]

19. *In Padam Singh v. State of U.P., it has been held that in an appeal against conviction, the appellate court is under duty and obligation to look into the evidence adduced in the case and arrive at an independent conclusion.*

20. *At this stage, we may refer with profit to a two-Judge Bench decision in Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. And Another wherein this Court, after referring to the pronouncements in Babu Rajirao Shinde v. State of Maharashtra and Siddanna Apparao Patil v. State of Maharashtra , opined thus :-*

“An appeal is indisputably a statutory right and an offender who has been convicted is entitled to avail the right of appeal which is provided for under Section 374 of the Code. Right of appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 is also a fundamental right. Right of appeal, thus, can neither be interfered with or impaired, nor can it be subjected to any condition.

xxx xxx xxx xxx

The right to appeal from a judgment of conviction vis-à-vis the provisions of Section 357 of the Code of Criminal Procedure and other provisions thereof, as mentioned hereinbefore, must be considered having regard to the fundamental right of an accused enshrined under Article 21 of the Constitution of India as also the international covenants operating in the field.”

21. *Tested on the touchstone of the aforesaid legal principles, it is luminescent that the High Court has not made any effort to satisfy its conscience and accepted the concession given by the counsel in a routine manner. At this juncture, we are obliged to state that when a convicted person prefers an appeal, he has the legitimate expectation to be dealt with by the Courts in accordance with law. He has intrinsic faith in the criminal justice dispensation system and it is the sacred duty of the adjudicatory system to remain alive to the said faith. That apart, he has embedded trust in his counsel that he shall put forth his case to the best of his ability assailing the conviction and to do full justice to the case. That apart, a counsel is expected to assist the Courts in reaching a correct conclusion. Therefore, it is the obligation of the Court to decide the appeal on merits and not accept the concession and proceed to deal with the sentence, for the said mode and method defeats the fundamental purpose of the justice delivery system. We are compelled to note here that we have come across many cases where the High Courts, after recording the non-challenge to the conviction, have proceeded to dwell upon the proportionality of the quantum of sentence. We may clearly state that the same being impermissible in law should not be taken resort to. It should be borne in mind that a convict who has been imposed substantive sentence is deprived of his liberty, the stem of life that should not ordinarily be stenosed, and hence, it is the duty of the Court to see that the cause of justice is subserved with serenity in accordance with the established principles of law.”*

9. Having noted the legal position that the first appeal under Section 374 Cr.P.C. is mandated to be decided on merits by the High Court, this Court

proceeds to examine the contention raised by the learned counsel in terms of the Hon'ble Supreme Court dated 6th October, 2021 in Sonadhar (supra).

10. As noted above vide the judgment dated 6th October, 2021 the Hon'ble Supreme Court directed the Delhi High Court Legal Services Committee to undertake an exercise even in respect of life sentence cases where the sentenced persons are entitled to remissions of the remaining sentence i.e. whether they would still like to contest the appeals or the remission of sentence would be acceptable to such of the convicts. It is thus evident that the Hon'ble Supreme Court permitted the convicts to avail either to contest the appeals or seek remission of the sentence.

11. The sentence of a convict is remitted in terms of Section 432 Cr.P.C. which reads as under:

“432. Power to suspend or remit sentences.

(1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without Conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, In the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose

favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with: Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and-

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub- sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in section 433, the expression "appropriate Government" means,-

(a) in cases where the sentence is for an offence against, or the order referred to in sub- section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed."

12. It is thus evident that the power to remit the sentence under Section 432 Cr.P.C. is available only with the Government and not with the Court. Supreme Court dealing with this provision reiterated, the principle of law that only the Government can remit the sentence of a convict and not the Court. In W.P.(CRL) No. 49/2022 titled as 'Ram Chander Vs. State of Chattisgarh & Anr.' decided on 22nd April, 2022 the Hon'ble Supreme Court held:

"A. Judicial Review of the Power of Remission

11. The respondents submit that the appropriate government has the absolute discretion to decide whether the application for remission should be allowed. Indeed, in Ratan Singh (supra), this Court has observed that the State has an undoubted discretion to remit or refuse to remit the sentence and no writ can be issued to direct the State Government to release the petitioner. The Court was interpreting Section 401 of the Code of Criminal Procedure 1898, which corresponds to Section 432 of the CrPC. Section 401 empowered the appropriate government to remit the whole or any part of the punishment sentence. The Court while summarizing the propositions that govern the exercise of the power of the remission, observed:

"9. From a review of the authorities and the statutory provisions of Criminal Procedure the following propositions emerge:

"(1) that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the cannot supersede the statutory provisions of the Penal Code, 1860. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure;

(2) that the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner;

(3) that the appropriate Government which is empowered to grant remission under Section 401 of the Code of Criminal Procedure is the Government of the State where the prisoner has been convicted and sentenced, that is to say, the transferor State and not the transferee State where the prisoner may have been transferred at his instance under the Transfer of Prisoners Act; and

(4) that where the transferee State feels that the accused has completed a period of 20 years it has merely to forward the request of the prisoner to the concerned State Government, that is to say, the Government of the State where the prisoner was convicted and sentenced and even if this request is rejected by the State Government the order of the Government cannot be interfered with by a High Court in its writ jurisdiction.” (emphasis supplied)

12. While a discretion vests with the government to suspend or remit the sentence, the executive power cannot be exercised arbitrarily. The prerogative of the executive is subject to the rule of law and fairness in state action embodied in Article 14 of the Constitution. In *Mohinder Singh (supra)*, this Court has held that the power of remission cannot be exercised arbitrarily. The decision to grant remission should be informed, fair and reasonable. The Court held thus:

“9. The circular granting remission is authorized under the law. It prescribes limitations both as regards the prisoners who are eligible and those who have been excluded. Conditions for remission of sentence to the prisoners who are eligible are also prescribed by the circular. Prisoners have no absolute right for remission of their sentence unless except what is prescribed by law and the circular issued thereunder. That special

remission shall not apply to a prisoner convicted of a particular offence can certainly be a relevant consideration for the State Government not to exercise power of remission in that case. Power of remission, however, cannot be exercised arbitrarily. Decision to grant remission has to be well informed, reasonable and fair to all concerned.”

In Sangeet (supra), this Court reiterated the principle that the power of remission cannot be exercised arbitrarily by relying on the decision in Mohinder (supra).

13. While the court can review the decision of the government to determine whether it was arbitrary, it cannot usurp the power of the government and grant remission itself. Where the exercise of power by the executive is found to be arbitrary, the authorities may be directed to consider the case of the convict afresh.”

13. In Ram Chander (surpa) the Hon’ble Supreme Court further dealt with the value of the opinion of the Presiding Judge under sub-section of Section 432 of Cr.P.C. and held that though the opinion of the Presiding Judge would enable the Government to take the “right” decision as to whether or not the sentence should be remitted, however the opinion of the Presiding Judge is not the only deciding factor. Therefore, it cannot be held that the appropriate Government should mechanically follow the opinion of the Presiding Judge. If the opinion of the Presiding judge does not comply with the requirements of Section 432 (2) Cr.P.C. or if the Judge does not consider the relevant factors for grant of remissions that have been laid down in Laxman Naskar Vs. Union of India, the Government may request the Presiding Judge to consider the matter afresh.

14. Admittedly, till date Appellant Vinod Kumar has not exercised its remedy of seeking remission before the Government but prays that this Court should remit the remaining sentence. However, the two other learned

counsels in view of the legal position explained above stated that de-hors the remorse expressed by the two appellants namely, Hanuman Mishra and Parveen Kumar, the appeals be decided on merits and they be acquitted, or in the alternative, the sentence of life imprisonment awarded to them be reduced preferably to the period already undergone. This Court having no power to remit the sentence, can however consider the quantum of sentence only after having satisfied itself that the impugned judgment of conviction is required to be sustained. In the light of the legal position noted above, this Court is required to decide the appeals on merits de-hors the concession of infraction made as also the quantum of sentence.

15. Learned counsel for the appellant Hanuman Mishra contended that even as per the victim the appellant used no force and the victim in the rukka, MLC and statement under Section 164 Cr.P.C. having stated that she was 18 years old, it cannot be held that appellant committed the offence of rape on the victim. Further, there are material inconsistencies in the statement of the victim. The appellant neither assaulted nor stopped her from leaving the house and has been falsely implicated. It is further stated that the date of birth of the prosecutrix as deposed by PW-18 being 3rd July, 1995 is not based on any record but an entry made on the basis of affidavit of the father of the prosecutrix. Hence, she having not been proved to be a minor and not protested to the alleged advancement of Hanuman Mishra, the appellant be acquitted. In the alternative, it is submitted that in view of the mitigating circumstances that the appellant has been in continuous custody since 10th April, 2011, he has an old mother aged 75 years to look after who is suffering from various ailments, the younger son of the appellant is also suffering from Anemia and other medical ailments, the appellant being from

a lower strata of society, has reformed himself and having undergone the sentence of imprisonment for 10 years, 9 months, 23 days as on 22nd September, 2022, he be released on the period already undergone.

16. Learned counsel for appellant Parveen Kumar challenging the judgment of conviction submits that the prosecutrix in her deposition before the Court failed to identify her clothes and stated that she had not worn those clothes at the relevant time, hence the DNA samples lifted from the shirt cannot be used to convict the appellant. There is material improvement in the testimony of the victim from the statement initially recorded, for the reason that, in her statement on the basis of which FIR was registered, the victim stated that when the second boy attempted to commit rape, she made the excuse for urination and thus ran away. Hence, the offence of rape has not been committed by the second boy. In view of the inconsistent testimony of the prosecutrix, the conviction of the appellant be set aside. In the alternative, it is argued that the alleged offence took place on the night intervening 8 and 9th April, 2011 when amendment was not brought to the IPC and the minimum sentence prescribed for an offence punishable under Section 376(2)(g) for which the appellant had been charged was 10 years and hence the sentence of the appellant be reduced to the period already undergone which is 10 years, 5 months, 22 days as on 22nd September, 2022. Reliance in this regard is placed on the decision reported as (2010) SCC Online Del 1532 Kishan Pal Vs. State. Reliance is also placed on the decisions reported as (2012) 2 SCC 684 Bavo @ Manubhai Ambalal Thakore Vs. State of Gujarat and (2014) SCC OnlineDel 1106 Lokesh Mishra Vs. State of NCT Delhi. Appellant Parveen Kumar has also preferred CRL.M.A. 8933/2019 whereby he prays that his sentence in the

present case i.e. FIR No. 87/2011 under Section 366/376(2)(g) IPC registered at PS Vasant Kunj titled as 'State Vs. Bijender & Ors.' be directed to run concurrently with the order on sentence dated 29th July, 2016 passed in FIR No. 419/2013 under Section 392/397/34 IPC and 25 Arms Act registered at PS Sampla pursuant to a conviction by the learned Additional Sessions judge, District Court Rohtak.

17. As noted above, the main challenge on merits to the conviction is to the reliability of the testimony of the prosecutrix and hence her testimony is required to be examined to see whether the said witness is reliable and conviction can be based solely on her testimony.

18. Before the Court, the prosecutrix appeared as PW-1 and deposed that she was born in Delhi, residing in Faridabad since childhood and had studied upto 8th standard. She knew Hanuman Mishra being the father of her Bhabhi who got married to her brother in the year 2006. She did not remember the exact date, however it was before 8th April, 2011 and then said 7th April, 2011 when Hanuman Mishra called up on the mobile phone of her father which is usually kept in the house. Her mother picked up the phone. She came to know that wife of Hanuman Mishra was not well and thus she was requesting to bring her for treatment at their place. Thereafter, she along with her mother went to Rangpuri i.e. the residence of Hanuman Mishra and brought the wife of Hanuman Mishra at their house. They provided medicines to her. In the evening Hanuman Mishra also came to their house. On the next day morning when Hanuman Mishra apprised the family members including the victim that the company in which he was employed was distributing gifts to daughters of their employees and since his daughter was away to the native place and the victim was also like his daughter, she

should accompany to his work place for getting the gift. Hanuman Mishra stated that he would bring back the victim by the evening. Thus Hanuman Mishra took her to his house at Rangpuri and left her at her house and went to his work place stating that he would be back with the gift. In the evening Hanuman Mishra gave her a gift i.e. salwar suit. Since she was keeping fast due to Navratra on that day, she requested Hanuman Mishra to take her back to her house at Faridabad, on which Hanuman Mishra stated that he was not feeling well and made expressions showing that he was not well and thus she could not say anything. As the night advanced, Hanuman Mishra told her father that due to night he was not able to return back along with his daughter at Faridabad. Thereafter, Hanuman Mishra apprised her that no gift has been given by the company and the so-called gift brought by him was purchased by him from the market. The victim became angry as to why he told a lie and brought her to his house, on which he replied that he had brought her for roaming “*ghumane laya tha*”. He further stated that he brought her so that “*mera mann behal jaye*”. Thereafter, Hanuman Mishra started watching TV. He took out a perfume bottle from his almirah and sprayed on her asking her about the fragrance. Thereafter, he started touching her. After the perfume was sprayed, she was not fully conscious. Thereafter Hanuman Mishra committed rape on her and she found herself without clothes. She raised an alarm after rape was committed, put on her clothes and left the house of Hanuman Mishra. She did not know the exact time when she left, however it was night time and Hanuman Mishra was lying on the bed complaining that he had pain in the stomach.

19. After she came out of the house of Hanuman Mishra, one white colour motor car met her on the way at some distance from the house of Hanuman

Mishra. One person was driving the car and two persons came later. The driver of the car asked her, where she was going and offered to help her stating that he would drop her at her home. Believing his version, she sat in the car. The two other persons also sat in the car and the driver drove the car. The two other persons were not known to her, however the driver knew them. The driver of the car drove the car to some distance, when she inquired where she was being taken. The driver and the two other persons threatened to kill her. She was taken somewhere in Dwarka where two persons who later boarded the car gave a punch on her mouth resulting in injury on her lip. Thereafter, the driver of the car and one of the two persons alighted from the car and one person remained in the car. She raised alarm and on this the person present in the car gave her a slap on her head. The said person forcibly committed sexual intercourse with her. She pointed out towards appellant Parveen in this regard. Thereafter, the second person came inside the car and started attempting to commit 'galat kaam' and did sexual intercourse with her forcibly. She pointed out towards appellant Vinod being the second person. She cried and raised alarm stating that she felt like urinating and also that she wanted to relieve herself. At this, one of the three persons stated that arrangement for water has to be made. One person went for arranging water and the rest two were talking to each other. On seeking the two persons talking, she fled away from there. The driver of the car ran behind her to catch her, however she was able to come out of the jungle and reached the pucca road. The driver of the car apprehended her on the road and she identified the driver pointing out towards the accused Bijender. At that time a car was passing from there and she asked for help from the car driver. At this Bijender stated to the car driver from whom she

was seeking help that the victim was his wife and crazy “*pagal*”. The said car driver left the spot. She tried to seek help from the other persons also but no one helped. In the meantime, Bijender caught hold of her and brought her inside the jungle and slapped her. She also hit Bijender with pieces of stone but could not free herself from the clutches. In the meantime, one more car came there which stopped. To the said driver Bijender uttered the same words as he stated to the earlier ones, however this car-wala believed her version and called the Police. 2 – 3 other persons came over there and asked Bijender to leave her hand but he did not leave her hand. In the meantime, Police came and apprehended Bijender. During the incident she sustained hurt on her legs. Thereafter, her statement was recorded vide Ex.PW-1/A on which FIR was registered. The witness identified her statement recorded under Section 164 Cr.P.C. and stated that the clothes were kept by the Doctor after her medical examination as also the gift given by Hanuman Mishra. She identified the unstitched suit as the one given by Hanuman Mishra. However, she failed to identify the lady’s shirt of red brown colour, her under-clothes and the salwar she had worn. However, clarified that the clothes which she was wearing at the time of incident was taken by the Doctor and she had changed the clothes when she came back from the hospital. Though this witness was extensively cross-examined, however except not identifying the clothes as stated in her examination-in-chief, nothing material could be elicited.

20. To prove that the victim was a minor, the prosecution examined Sita Ram/ PW-18 Secretary-cum-Manager of the school who brought the letter of the Head Master/ Principal of the school who had left, noting her date of birth to be 3rd July, 1995 as also the copy of the admission form in respect of

the victim and the affidavit filed by the father of the victim vide Ex.PW-18/A to PW-18/C.

21. The version of the victim is duly supported by the DNA analysis which notes as under:

“The DNA profiling (STR analysis) performed on the exhibits provided is sufficient to conclude the source of the exhibit ‘3’ (Blood Gauze of accused Hanuman Mishra), exhibit ‘6’ (Blood Gauze of accused Parveen) and exhibit ‘9’ (Blood Gauze of accused Vinod) are responsible for biological stains i.e. seminal stains present on exhibit ‘1g(ii) (Microslide), exhibit ‘2a’ (Shirt) & exhibit ‘12’ (Stain lifted from rear seat of car bearing regd. DL-1YB-4580)”

22. In view of the cogent and convincing testimony of the prosecutrix, duly corroborated by the facts that Bijender was apprehended when she called for help from the people sitting in cars going at that time and soon thereafter her medical was conducted, she got her statement recorded wherein she implicated Hanuman Mishra, Bijender and two other accused whom she could identify on being produced and the DNA report, this Court finds no error in the impugned judgment convicting the appellants for offences as noted above.

23. Section 376 IPC before the amendment as applicable at the time when the offences were committed provided for the following punishment :

“376. Punishment for rape.—(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with

imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided 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.

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.—“Women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected woman or children or a widows’ home or by any other name, which is established and maintained for the reception and care of woman or children.

Explanation 3.—“Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.]”

24. Learned counsels for the appellants have relied upon the decisions reported as (2012) 2 SCC 684 Bavo Vs. State of Gujarat and (2010) SCC Online Del 1532 Kishan Pal Vs. State to contend that they should be awarded the minimum sentence of imprisonment of 10 years which they have already undergone and thus be released on the said period. Undoubtedly as held by this Court in Kishan Pal Vs. State, the Court has to start from the minimum sentence. However it has to be examined whether there are extenuating circumstances which overshadow the mitigating circumstances to award the maximum sentence.

25. In the present appeals as regards Hanuman Mishra is concerned, he owed a fiduciary relation with the victim and asserting the said relationship he tricked the parents of the victim to send the victims with him so that he could avail of a gift in name of his daughter from the company, which gift was never to be given. Thus in a very preplanned manner taking advantage

of his relationship he brought the minor victim to his house and committed rape.

26. As regards appellants Vinod Kumar and Praveen Kumar are concerned, as noted above, they after the co-accused Bijender (PO) assured her to safely drop the victim at her house, alongwith Vinod Kumar and Praveen Kumar took her to jungle area and committed gang rape on the victim, who ran out of their clutches using courage and presence of mind.

27. Considering the manner in which the offences were committed by the appellants, this Court finds no error in the impugned order on sentence, directing the appellants to undergo life imprisonment. As noted above, it will be for the appellants to seek remission from the State Government in terms of Section 432 Cr.P.C.

28. Appeals are accordingly dismissed, with liberty to the appellants to seek remission in terms of the decision of the Hon'ble Supreme Court in Sonadhar (supra).

29. Copy of the judgment be sent to the Superintendent Jail for updation of records and intimation to the appellants.

CRL.M.B. 615/2022 in CRL.A. 556/2019

30. In view of the appeal having been disposed of, application is dismissed as infructuous.

CRL.M.A. 8933/2019 in CRL.A. 562/2019

31. By this application, appellant Praveen Kumar seeks concurrent running of the sentences in the present appeal and that awarded in FIR No.419/2013, P.S. Sampla, Haryana. The two offences not being in the course of same transaction, this Court finds no ground to accede to the prayer of the appellant Praveen.

32. Application is dismissed.

(MUKTA GUPTA)
JUDGE

(ANISH DAYAL)
JUDGE

NOVEMBER 3, 2022
‘ga’



Signature Not Verified

Digitally Signed By ANIL
KUMAR BHATTI

Signing Date: 03.11.2022
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Crl.A. Nos. 517/2019, 556/2019 & 562/2019

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