

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

+ **Crl. A. No. 615/2005**

Date of Order: 2nd February 2010

GOPAL SHARMA Appellant
! Through: Mr. Sumeet Verma, Adv.

versus

\$ STATE Respondent
^ Through: Mr. Jaideep Malik, APP.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

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

: V.K. JAIN, J. (Oral)

1. This is an appeal against judgment dated 27th August 2004 and the Order on Sentence dated 3rd September 2004, whereby the appellant was convicted under Section 376 of IPC and was sentenced to undergo R.I. for 10 years and to pay fine of Rs.20,000/- or to undergo S.I. for one year, in default.

2. On 8th of May 2003, the prosecutrix lodged a complaint, alleging therein that about two months ago, when she was alone

in the house with her father, he made her sleep with him in the night and committed rape with her, after removing her clothes as well as his own clothes. When she started weeping on account of pain, her father (the appellant) gave 2-3 slaps to her. After that day also, she was raped 3-4 times. She did not disclose this incident to anyone since she was afraid that if came to the knowledge of her father, he would give beatings to her. On the date of lodging of the FIR, her aunt Salomi came to her residence and the incident was narrated by her to the aunt, who took her to the police and the incident was then reported.

3. The prosecutrix came in the witness box as PW-1 and stated that she used to live with her father and step-mother in a jhuggi in Gautam Puri. Her step-mother Raj Kumari left them and went away to her Village. She further stated that when she was sleeping, her father took her to sleep with him and thereafter committed rape with her after removing her clothes as well as his own clothes. He also threatened her and said that she would be given beating if the incident was disclosed by her to anyone. According to the prosecutrix, thereafter, she was subjected to rape by her father 3-4 times. She narrated the incident to her aunt Sharda and the police then came to the school of her aunt.

4. PW-2 Sharda has stated that she was working as a Teacher in an organization and the prosecutrix used to come there with her sister for taking food products for them. When the prosecutrix disclosed to her that they had no food in their house, she suggested her to study in their school, which would also provide food to them. The prosecutrix complained that her father used to beat her and was not providing food to her. When she said that there must be some mistake on her part on account of which her father used to beat her, the prosecutrix started crying and disclosed that her father had been doing wrong acts with her. When she asked the prosecutrix to tell her what wrong acts was being done by her father, she disclosed that he used to commit rape with her after removing clothes. At that time Salomi was also with this witness. She informed her Head Office and the police came to the spot and recorded the statement of the prosecutrix, who then was taken to AIIMS and was then medically examined.

5. PW-4 Salomi Barla, who is a Field Worker in Arpana Trust, has stated that the prosecutrix had met her in Gautam Puri and complained about beatings and harassment by her father. She also disclosed that her father used to make her sleep with him and do wrong acts with her. She informed PW-2 about the

matter and then police was called and the complaint was lodged by the prosecutrix with the police, in their presence.

6. PW-7 Sh. Bhim Singh is a Teacher in MCD Primary School and he has stated that as per the record of the school, date of birth of the prosecutrix was 8th April 1991. Ex.PW-7/B is the copy of the School Leaving Certificate, whereas Exs.PW-7/C and 7/D are the copies of admission file register and admission register, respectively. Ex.PW-7/A is the copy of Birth Certificate, which was furnished to the school at the time of admission of the prosecution to the school. PW-8 Dr. Suman Meena examined the prosecutrix on 8th May 2003, vide MLC Ex.PW-8/A.

7. In his statement under Section 313 of Cr.P.C. appellant admitted that the prosecutrix was his daughter and was living with him in a jhuggi in Gautam Nagar. He also admitted that his second wife, who was step-mother of the prosecutrix, had left him and had gone to her native place along with the younger sister and brother of the prosecutrix. He, however, denied raping the prosecutrix and giving beatings to her.

8. I see absolutely no reason to disbelieve the prosecutrix, who is none other than the daughter of the appellant. In his statement under Section 313 of Cr.P.C., the appellant has not disclosed any reasons for the prosecutrix to make false

accusation of beating and rape against him. He does not even claim that someone had instigated the prosecutrix to make false allegation of rape against him. Even otherwise, the appellant being the father of the prosecutrix, who was less than 12 years of age when she was first subjected to rape, it is extremely unlikely that she would implicate him in a false case of this nature. The prosecutrix had nothing to gain, but everything to lose by reporting an incident of this nature against her father. She knew very well that if the incident was reported to the police, her father would be arrested and she would then have no one to give shelter and to look her after, her step-mother and younger brother and sister having already left the appellant and having gone to the native place of her step-mother. In fact, had the prosecutrix not come in contact with PW-2 and PW-4, in all probabilities her exploitation at the hands of the appellant would have continued and thus this heinous act would not even have come to surface. The statement made by the prosecutrix firstly to PW-2 and PW-4 and then to the Doctor who examined her in the hospital also corroborates her testimony given in the Court. The previous statement of the prosecutrix would be corroborative evidence within the meaning of Section 157 of Evidence Act. This proposition of law was recognized by the

Hon'ble Supreme Court in **Sheikh Zakir vs. State of Bihar**
1983 Criminal Law Journal, 1285.

9. It was contended by the learned counsel for the appellant that the medical evidence does not support the allegations of rape. I have perused the MLC of the prosecutrix. It shows that at the time of her examination in the hospital, her vagina easily admitted index finger. PW-8 stated in the cross-examination that under normal circumstances a person of 12 years would not admit one finger. According to the prosecutrix, she was raped a number of times by the appellant. That explains why her vagina could easily admit the index finger, when she was examined in hospital. Therefore, it cannot be said that the prosecutrix had not been subjected to rape as claimed by her. The Court cannot be oblivious to the fact that the appellant being none other than the father of the prosecutrix, she being a small child aged less than 12 years at that time and being alone in the house alongwith the appellant, it would be unrealistic to expect her to give a tough resistance to sexual assault by the appellant. It has also come in the deposition of the prosecutrix that when she resisted, the appellant slapped her and also threatened to give more beatings to her in case the incident was disclosed by her to anyone. Thus, besides being of tender age and all alone in

the house, the prosecutrix was also terrified on account of the beatings and threat given to her by the appellant. If the prosecutrix was not in a position to put up a tough resistance, there won't be physical marks of violence on her private parts, when she is examined in hospital. The first incident of rape occurred about two months before the prosecutrix was examined in a hospital. The prosecutrix was again subjected to rape 3-4 times thereafter. Hence, no mark of injury was likely to be found on her private parts when she had examined in the hospital on 8th May, 2003. As noted by the Hon'ble Supreme Court in **State of H.P. vs. Gian Chand**, (2001) 6 SCC 71, in case of children who are incapable of offering any resistance external marks of violence may not be found. (See Modi's Medical Jurisprudence, 22nd Edn., P. 502). The prosecutrix has very clearly stated in her deposition that the appellant had penetrated into her vagina. Even slightest penetration is sufficient to constitute rape. The description of the act committed by the appellant, as given by the prosecution in the Court as well as to PW-2 and PW-4, leaves no reason to doubt that the appellant had subjected the prosecutrix to rape and he did it on a number of occasions.

10. There has been some delay on the part of the prosecutrix in reporting the incident as, according to her, she was for the first

time subjected to rape about two months before she reported the matter. As regards delay in reporting the matter to the police, the Hon'ble Supreme Court noted in **Ravinder Kumar vs. State of Punjab**, 2001 (VII) AD (SC) 2009, that the law has not fixed any time limit for lodging FIR and delayed FIR is not illegal. Though prompt lodging of FIR is ideal, that by itself does not guarantee the genuineness of the version given in it. Whenever there is delay in lodging FIR, the Court ought to look for reasons, if any. But, delay by itself cannot be the sole ground to doubt and discard the entire case of the prosecution though it does put the Court, on guard, to look for explanation, if any.

11. In **State vs. Gurmeet Singh**, AIR 1996 SC 1393, the Hon'ble Supreme Court, inter alia observed as under:

“The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. *It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.*”

12. In the case of **Gian Chand** (supra), the Hon'ble Supreme Court observed that incidents like rape, more so when the

perpetrators of the crime happens to be a member of the family or related therewith, involve the owner of the family and therefore, there is a reluctance on the part of the victim to report the matter to the police and carry the same to the Court. The Hon'ble Supreme Court was of the view that mere delay in filing FIR is no ground to doubt the case of the prosecution and not believing the testimony given by the prosecutrix in the Court. It was held that delay in lodging FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on that ground.

13. In the facts and circumstances of the case, the delay in reporting the incident cannot be said to be fatal to the prosecution. The appellant was none other than the father of the prosecutrix. After raping her, he used to give beatings to her and also used to threaten her that she will be subjected to further beating in case the incident will be disclosed by her to anyone. The prosecutrix at that time being a girl aged less than 12 years and the appellant being her father, who was providing food and shelter to her, it was not expected of the prosecutrix to rush to a police station all alone and report an incident of this nature to the police. As noted earlier, the prosecutrix, at that time, was living all alone with the appellant in his jhuggi, her

step-mother having already gone to her native place, along with her other children after deserting the appellant. Had there been some other member of the family living with the prosecution in that jhuggi, she might have gathered courage to take him/her into confidence and share her plight with him/her. She did disclose the incident at the very first opportunity when she met PW-4 and found someone in whom she could confide. Once the prosecutrix had met PW-4, there was no delay in reporting the incident to the police.

14. As regards the age of the prosecutrix, a perusal of Ex.Pw-7/A, which is the copy of the birth certificate of the prosecutrix, submitted at the time of her admission in the school would show that she was born on 8th April 1991. A perusal of the School Leaving Certificate Ex.PW-7/B would show that same was the date of birth of the prosecutrix recorded in her school record. There is absolutely no reason for not accepting date of birth of the prosecutrix given not only in her birth certificate, but also in her school leaving certificate and other record of the school. In fact, when the appellant was examined under Section 313 of Cr.P.C. even he did not claim that she was not born on 8th April 1991. He simply expressed his ignorance in the matter. I,

therefore, have no hesitation in concluding that the date of birth of the prosecutrix is 8th April 1991.

15. In view of the above discussion, I am of the considered view that the appellant has rightly been convicted under Section 376 of IPC and his conviction is accordingly maintained.

16. The learned counsel for the appellant sought reduction of sentence awarded to the appellant on the ground that since the prosecution was not less than 12 years of age at the time she was subjected to rape, the provisions of Section 376(2)(g) prescribing a minimum sentence of 10 years would not apply. In my view the contention is totally misconceived. The FIR was lodged on 8th of May 2003 and according to the prosecution she, for the first time, was subjected to rape about 2-3 months before she reported the matter to the police. It would mean that the prosecutrix for the first time was subjected to rape on or around 8th March 2003. Since the date of birth of the prosecutrix is 8th April 1991, she was less than 12 years of age when she was first subjected to rape. Hence, the provisions of Section 376(2)(g) of Indian Penal Code squarely apply in the matter of awarding the sentence to the appellant.

17. The appellant being father of the prosecutrix was expected to protect and safeguard her. Instead of doing that he chose to

become a demon and had no compunction in subjecting his own daughter to repeated acts of rape. He took no pity on his own daughter, who at that time was less than 12 years of age. Such a person deserves no leniency and any sympathy for such a person would be entirely misplaced. The prosecutrix would never, in her life, forget the trauma experienced by her at the hand of her own father and the heinous and abhorable act committed by him will keep 'haunting her throughout her life.

18. In **State of Andhra Pradesh vs. Bodem Sundara Rao** 1995 (6) SCC 230, the Hon'ble Supreme Court observed as under:

“Public abhorrence of the crime needs a reflection through the Court's verdict in the measure of the punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape of a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane.”

19. In **State of Karnataka vs. Krishnappa** AIR 2000 SC 1470, the respondent before the Hon'ble Supreme Court had raped a girl aged about 7-8 years at that time. The Trial Court awarded sentence of rigorous imprisonment for 10 years to him.

The High Court, however, reduced the sentence to 4 years on the ground that accused was illiterate and belonged to a weaker section of society besides being addicted to drinking and had committed offence in the state of intoxication. Setting aside the order of the High Court, the Hon'ble Supreme Court, inter alia observed as under:

“Thus, the normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years R.I. though in exceptional cases “for special and adequate reasons” sentence of less than 10 years R.I. can also be awarded. It is a fundamental rule of construction that a proviso must be considered with relation to the principle matter to which it stands as a proviso particularly in such like penal provisions. The Courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. Recourse to the proviso can be had only for “special and adequate reasons” and not in a casual manner. Whether there exist any “special and adequate reason” would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application.

12. The approach of the High Court in this case, to say the least, was most casual and inappropriate. There are no good reasons given by the High Court to reduce the sentence let alone “special or adequate reasons”. The High Court exhibited lack of sensitivity towards the victim of rape and the society by reducing the substantive

sentence in the established facts and circumstances of the case. The Courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commissions of like offences by others.”

20. In **Kamal Kishore Vs. State** 2000 (2) SCC 706, which again was a case of rape, the Hon’ble Supreme Court observed that normally the court has no discretion to award a sentence less than the prescribed sentence and a lesser sentence can be awarded only in extreme rare contingencies. The Courts, therefore, need to respect the legislative mandate, which is loud and clear, that the person, who indulges in such a heinous and deplorable crime, deserves no leniency and should not escape adequate punishment. I, therefore, see absolutely no reason for reducing the sentence awarded to the appellant. There is no merit in the appeal. The same is hereby dismissed.

One copy of this order be sent to the appellant through concerned Jail Superintendent. The file of the Trial Court be sent back alongwith the copy of the judgment.

**V.K. JAIN
(JUDGE)**

FEBRUARY 2, 2010

Ag/Bg