

**(2007) 11 AHC CK 0140****Allahabad High Court****Case No:** None

Arvind

APPELLANT

Vs

State of U.P.

RESPONDENT

**Date of Decision:** Nov. 13, 2007**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 376, 506

**Hon'ble Judges:** R.K. Rastogi, J; K.S. Rakhra, J**Bench:** Division Bench**Final Decision:** Allowed**Judgement**

R.K. Rastogi, J.

This is an appeal against judgment and order dated 1.3.2006 passed by Sri Nisamuddin, then learned Addl. Sessions Judge, Fast Track Court No. 1, Budaun in Sessions Trial No. 161 of 2005, State v. Arvind, under Sections 376 and 506 I.P.C. of police station Jarif Nagar, Budaun.

2. The facts giving rise to this appeal are that on 1.9.2004 at about 3.10 P.M. Sri Kallu resident of village Nadha police station Jarif Nagar district Budaun lodged F.I.R. against accused appellant Arvind with these allegations that on 30.8.2004 his son Deoki had gone to police outpost and when he did not return back his daughter Laxmi aged about 8 years went to the police outpost to see him. The accused Arvind met her near bus stand and he after showing pistol to Laxmi and threatening to kill her took her in his lap and carried her below a tree and ravished her. Thereafter he threw her near Atal School and went away. Kallu could not go to police station due to fear of the accused, and on 1.9.2004 on getting opportunity, he went to the police station and lodged the report. He further stated that clothes which were worn by Laxmi at the time of incident had been washed.

3. On the basis of the above report, the police registered a case under Sections 376 and 506 I.P.C. against the accused appellant and investigated the same. Kumari Laxmi was medically examined by Dr. Manju Rastogi on 2.9.2004. She prepared medical examination report and in the description of Km. Laxmi at the top of that report her age was described as 8 years. Her height was 4"-3", weight was 24 Kgs. and teeth were 6/6 and 7/7. Her breasts were not developed and axillary hair were absent. There was a toothed abrasion on right cheek in an area of 2"x2" and another toothed abrasion in an area of 2.5 cm x 2 cm on the left cheek. Her hymen and vagina were found torn at 6, O"clock position, muscle deep covered with clotted blood; vagina admitted one finger painfully. Vaginal wound was 1 cm x 0.5cm in size and it was a lacerated wound. Her vaginal smear was taken for Pathological examination to ascertain presence of sperms. X-Ray was advised for ascertainment of her age. The Pathologist after examination of vaginal smear submitted a report on 2.9.2004 that sperms were present in vaginal smear. According to X-Ray report epiphyses of elbow joints and wrist joints were not fused. Dr. Manju Rastogi on the basis of the vaginal smear report and the X-Ray report prepared a supplementary report and stated that the girl was minor and her age was below 16 years and the vaginal smear report was suggestive of recent intercourse.

4. The police after completion of investigation submitted a charge sheet against the accused under Sections 376 and 506 I.P.C. and the case was committed to the court of sessions for trial.

5. Sri Chaitanya Kumar Kulshrestha, Addl. District & Sessions Judge, Court No. 10, Budaun, to whom the case was transferred for trial, framed charges against Arvind under Sections 376 and 506 I.P.C. The accused pleaded not guilty and claimed trial.

6. The prosecution examined Kallu as P.W.1. He is father of Kumari Laxmi. He has narrated entire F.I.R. case on oath and has proved the F.I.R. Ex.Ka 1. He has further stated that there was bleeding from vagina of Laxmi and so her mother asked her about that bleeding and then Laxmi narrated the entire incident before her mother. He further stated that due to fear of the accused he could not go to police station to lodge the report earlier and on third day he got the F.I.R. written by Hari Om and then he went to the police station to lodge that report.

7. The statement of Laxmi, P.W.2, was also recorded by the court on 31.7.2005 and in that statement she described her age as nine years. She stated that she was a student of Class III in Primary School Rashulpur and had come to give her statement and then she stated on oath that on the date of incident at about 7 P.M. she had gone to the police outpost to see her brother, Deoki. Deoki met her at the police outpost and asked her to return back to the house stating that he will also be coming backsoon. Then she proceeded on return journey and when she reached near bus stand, accused Arvind met her. He showed her pistol and took her in his lap and threatened that he would murder her brother. He carried her below a tree. He pushed handcer- chief in her mouth. Then he first pushed his finger in her vagina

and thereafter his penis in her vagina and ravished her and then he threw her near Atal School. Then she proceeded to her house, and on account of fear, she took bath. Her frock and underwear which were stained with blood, were also washed by her. However, her mother had seen those blood stained clothes and so she questioned her about the blood, and then she told her mother that accused Arvind had ravished her. She further stated that she had recognized Arvind in the moonlight. Thereafter her parents took her to the police station, where the report was lodged and after lodging the report, she was sent to the hospital along with her mother and a police constable for medical examination.

8. Dr.T.N.Sharma, Senior Pathologist, was examined as P.W.3. He had performed X-Ray of wrist and elbow joints of Laxmi, he has proved X-Ray report , Ex.Ka 2, and also proved X-Ray plate, Ex. 1.

9. Dr. S.P. Sharma, Pathologist, was examined as P.W.4. He had examined vaginal smear of Laxmi. He has proved vaginal smear report, which is Ex.Ka 3. He has stated that sperms were found in the vaginal smear.

10. Sri Dharma Pal Singh, Sub Inspector, (P.W.5) had investigated the case and had inspected the spot and prepared its site plan, Ex.Ka 4. After completion of the investigation, he submitted a charge sheet against the accused, which is Ex.Ka 5,. He has also proved the chik report prepared by constable Badri Singh on the basis of F.I.R. which is Ex.Ka 6.He also proved the G.D. entry regarding registration of the case, which is Ex.Ka 7.

11. The statement of Dr. Manju Rastogi was recorded as P.W.6. She had medically examined Kumari Laxmi. She had prepared medical examination report, Ex.Ka 8 and supplementary report Ex. Ka 9. She has further stated that on the basis of X-Ray report she was satisfied that age of Kumari Laxmi was less than nine years.

12. The accused in his statement u/s 313 Cr.P.C. denied the prosecution allegations against him. He stated that there was festival of Raksha Bandhan on 30.8.2004 and so he alongwith his wife and son had gone to his father-in-law's house at Chandausi, so that his wife may tie Rakhi to her brothers. He further stated that he was not present at village Nadha on 30.8.2004 and under instructions of Kallu, Laxmi had levelled false allegations of rape against him.

13. The accused produced Thakur Das resident of Sarswati Nagar, Hanuman Garhi Chandausi as D.W.1. He stated that he was neighbour of Chandra Pal, father -in-law of Arvind and his brother Harpal. Arvind's wife Mamta had no real brother so she tied Rakhi to her cousin brothers, sons of Harpal and on 30.8.2004. Arvind and Mamta had come to that place to celebrate the festival of Rakha Bandhan.

14. Harpal Singh, who is cousin father-in-law of the accused, was examined as D.W.2 and he has stated that on 30.8.2004 Arvind and Mamta had come to his house to tie Rakhi to his sons.

15. Anek Singh resident of village Nadha, who runs a shop near the bus stand Nadha was examined as D.W.3. He has stated that on 30.8.2004 no incident of rape took place at any place near the bus stand.

16. The learned Presiding Officer of the court, after hearing of the case, came to a conclusion that both the charges under Sections 376 and 506 I.P.C. were sufficiently proved against the accused. He, therefore, convicted him u/s 376 I.P.C. and sentenced him to life imprisonment and to a fine of Rs. 15,000/-. It was further provided that in case of default in payment of fine, the appellant shall have to undergo additional imprisonment for five years. He also convicted the accused u/s 506 I.P.C. and sentenced him to two years rigorous imprisonment. It was further provided that all the sentences shall run concurrently.

17. Aggrieved with the above judgment and order, the accused-has filed this appeal.

18. We have heard Sri P.N. Misra, learned Senior Counsel, assisted by Sri Apul Misra for the appellant and Mr. Pranay Krishna, learned A.G.A. for the State and have perused the record.

19. The Learned Counsel for the appellant submitted before us that there is inordinate delay of two days in lodging the F.I.R., so the entire prosecution story becomes doubtful. He further submitted that Kumari Laxmi P.W.2 has stated in her cross examination that she had no previous acquaintance with the accused and she did not know him. He pointed out that in this case there is no eye witness of the incident and the entire case is based upon the testimony of Kumari Laxmi only. His contention was that when Kumari Laxmi had no previous acquaintance with the accused and when she did not know his name, it is not clear as to how her parents came to know that the accused had ravished her. He further submitted that Dr. Manju Rastogi P.W. 6 in her supplementary report, Ex. Ka 9, has expressed her opinion that the age of Kumari Laxmi was below 16 years. It is submitted that according to the above assessment of age done by Dr. Manju Rastogi, she was aged about 16 years and there can be a margin of two years on both the sides and so Kumari Laxmi cannot be deemed to be minor. He also referred to some discrepancies in the statements of the witnesses recorded u/s 161 Cr.P.C. and in their statements before the court.

20. The learned A.G.A. submitted in reply that according to the statement of Kallu P.W.1, accused Arvind and his other companions remained collected around his house for one day and so he could not go to the police station to lodge the report of the incident on 31.8.2004, and when he got an opportunity on 1.9.2004 he went to the police station and lodged the report. He further submitted that this fact has not been specifically stated in the F.I.R. but its indication has been given in the following sentence of the F.I.R.:

Hk; ds dkj.k eSa fjiksVZ ntZ djkus ugha vk ldkA ekSdk ns[kdj vkt eSa fjiksVZ ntZ djkus vk;k gwWaA

21. He submitted that in this case the accused along with his companions remained roaming around the house of Kallu during the entire day on 31.8.2004 and so even if Kumari Laxmi had no previous acquaintance with the accused Arvind, she would have told her parents on seeing Arvind who was roaming around her house, that this accused had ravished her. He further pointed out that Kumari Laxmi has stated in her statement as P.W.2 that there was sufficient moonlight at the time of incident and she had recognized Arvind accused. It was also pointed out that it was full moon night of Raksha Bandhan. He further submitted that in this case it was stated by Kallu in the F.I.R. that the age of Kumari Laxmi was 8 years and same age was noted by Dr. Manju Rastogi in her medical examination report dated 2.9.2004. He further pointed out that her height was and only, her weight was 24 Kgs. and she had only 12 teeth in her upper jaw and 14 teeth in her lower jaw. Her breasts were also not developed and she had no axillary hair. According to X-Ray report her elbow and wrist joint were also not fused. He further submitted that Dr. Manju Rastogi has not written that age of Kumari Laxmi was about 16 years but she has stated in the supplementary report that it was below 16 years and she has further explained in her statement as P.W.6 that on receiving X-Ray report she was convinced that age of Kumari Laxmi was less than 9 years and as such there is no force in the plea of the accused that she was aged 16 or 18 years. He further submitted that in this case this fact is sufficiently proved from the medical evidence that Kumari Laxmi had been ravished and the accused has no where explained as to why he has been falsely implicated in this case. There is no description of any enmity with Kallu and his family members and the only suggestion given at the end of the cross examination of P.W.1 Kallu is that he has been implicated falsely on account of partibandi in the village. He submitted that this allegation does not inspire any confidence as no one would falsely implicate a person in a rape at the cost of reputation of his unmarried daughter. He further submitted that contradictions in the statements of the witnesses u/s 161 Cr.P.C. and their statements before the court are minor, and as such of no importance and they do not render any help to the accused.

22. Having considered the submissions made by both the parties and after going through the evidence on record, we are of the view that the charges under Sections 376 and 506 I.P.C. are sufficiently proved against the accused in the present case.

23. It is to be seen that in this case prosecutrix is an innocent girl aged about 8 to 9 years. The medical report reveals that she had toothed abrasions on both the cheeks. Her hymen and vagina both were torn at 6,O'Clock position and vagina admitted even one finger painfully. Vaginal wound was 1cm x 0.5 cm in size, spermatozoa were also found in her vaginal smear and the presence of spermatozoa in vaginal smear sufficiently proved that she had been ravished and there is no force in the contention that she might have received injury on her private part by fall on any hard object.

24. The statements of the witnesses Thakur Das D.W.1, Harpal Singh D.W.2 in support of the plea of alibi of the accused that he was at his father-in-law's house on the date of incident do not inspire any confidence, since the accused has failed to explain as to what was the motive for his false implication. The accused has also examined Anek Singh as D.W.3 who has stated that he runs a shop near the bus stand and that no incident of rape had taken place on the date, time and place propounded by the prosecution. Such type of negative evidence is worthless and is of no avail.

25. Considering the evidence on record, we are of the view that both the charges under Sections 376 and 506 I.P.C. were sufficiently proved against the accused beyond reasonable doubts and the trial court rightly convicted the accused persons for both these offences.

26. The Learned Counsel for the appellant submitted in the end that punishment of life imprisonment to the accused appellant is too severe and it should be reduced. He further submitted that the accused has been continuously in jail during trial of the case as well as during pendency of this appeal and so a lenient view should be taken in the matter.

27. He further submitted that age of the accused was 20 years at the time of his statement u/s 313 Cr.P.C. on 1.2.2006 and taking into consideration his age and that he has to maintain his wife and son, the sentence of life imprisonment should be reduced.

28. On the other hand, the learned A.G.A. has submitted that the accused had brutally ravished a minor girl of 8 to 9 years only and so the accused does not deserve any sympathy. It is to be seen that the accused committed the offence u/s 376 (1) I.P.C. which is punishable with minimum imprisonment of seven years and it may extend upto life imprisonment.

29. Taking into consideration the submissions made by both the parties as well as the facts and circumstances of the case we are of the view that sentence of life imprisonment is severe in the present case, and it should be reduced to rigorous imprisonment for ten years only. This sentence of ten years coupled with a fine of Rs. 15,000/- shall meet the ends of justice.

30. So far as the sentence of two years rigorous imprisonment u/s 506 I.P.C. is concerned, that does not require any interference as both the sentences are to run concurrently, as directed by the trial court. The appeal deserves to be allowed to the above extent only. The appeal is thus partly allowed to this extent only that while maintaining conviction of accused-appellant u/s 376 and 506 I.P.C., sentence of life imprisonment awarded to the accused u/s 376 I.P.C. is reduced to rigorous imprisonment for ten years only but the sentence of fine of Rs. 15,000/- u/s 376 I.P.C. is maintained and in case of default in payment of fine he shall have to undergo imprisonment of five years, as ordered by the trial court. The sentence of

two years rigorous imprisonment awarded to the accused u/s 506 I.P.C. is also maintained, but both the sentences shall run concurrently as ordered by the trial court. The period of detention of the accused in jail during trial and during pendency of this appeal shall be adjusted towards the sentence awarded to him.

31. Let a copy of this judgment be certified to the trial court for information and execution.