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**(2014) 08 AHC CK 0225**

**Allahabad High Court (Lucknow Bench)**

**Case No:** Cr. Appeal No. 973 of 2006

Nand Kishore

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** Aug. 7, 2014

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 374(2)
- Penal Code, 1860 (IPC) - Section 376

**Citation:** (2014) 87 ALLCC 710

**Hon'ble Judges:** Imtiyaz Murtaza, J; Ashwani Kumar Singh, J

**Bench:** Division Bench

**Advocate:** Amol Kumar, Brij Mohan Sahai, Mukesh Kumar Tewari, Rajendra Prasad Mishra and Vinod Kumar Mishra, Advocate for the Appellant

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**Judgement**

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Imtiyaz Murtaza, J.

This appeal under section 374(2) Cr.P.C. has been preferred by appellant Nand Kishore @ Seth Pasi, son of Ram Dheraj against the judgment and order dated 1.5.2006 passed by Special Judge (S.C./S.T.) Act/Addl. Sessions Judge Court No. 2, Balrampur in Sessions Trial No. 108/2004 (State of U.P. v. Nand Kishore @ Seth) convicting and sentencing the appellant under section 376 I.P.C. for imprisonment of life and a fine of Rs. 10,000/- and in default of payment of fine to further undergo R.I. of three years. Out of the amount of fine, Rs. 7000/- was to be paid as compensation to the victim. Briefly stated, the prosecution case is that victim (name withheld by us) daughter of complainant, Chinkau @ Radhey Shyam, aged about 10 years, on 29.6.2004 at about 5:00 p.m. was playing at the door; Appellant Nand Kishore @ Seth, son of Ram Dheraj, whose house situates next to the house of

complainant Chinkau @ Radhey Shyam, enticed the victim and took her to his house; he committed rape on the victim who came back to her house crying. Complainant Chinkau @ Radhey Shyam, who was present at the house, saw blood oozing out from victim's private parts and when he enquired, she narrated that appellant Nand Kishore @ Seth after removing her underpants, committed sexual intercourse with her and when she started weeping she was left.

2. The first information report (Ext. "Ka"-4) of the present incident was lodged on the same day, i.e. 29.6.2004 at 22:00 hours. The victim was examined at M.I.K. Female Hospital, Balrampur on 30.6.2014 at about 1:30 a.m. by P.W. 6 Dr. Arunima Srivastava. On 1.7.2014 P.W. 7 Dr. O.P. Srivastava, Dental Surgeon took X-ray of mandible lateral/view and opined the victim's dental age to be 10-12 years (Ext. "KA"-9). Dr. Y.P. Gupta (P.W. 8) also X-rayed right elbow, right wrist of victim; epiphysis of Head of radius and lower end of radius & ulna and medial epicondyle of the humerus and found that they were not fused (Ext. "Ka"-8).

3. The investigation was conducted by S.I. Rajendra Prasad; the accused was arrested on 1.7.2004; after completion of the investigation, charge-sheet was submitted to the Court of Chief Judicial Magistrate. The Court proceeded with other legal formalities and then committed the case to the Court of Sessions. The accused denied charge framed against him for the offence punishable under section 376 I.P.C. and claimed to be tried.

4. The prosecution, to prove its case, examined Chinkau @ Radhey Shyam (P.W. 1); Ram Pooran (P.W. 2); the victim (P.W. 3); Investigating Officer S.I. Rajendra Prasad ((P.W. 4); H.C. Ashok Kumar Singh (P.W. 5); Dr. Smt. Arunima Srivastava (P.W. 6); Dr. O.P. Srivastava (P.W. 7) and Dr. Y.P. Gupta (P.W. 8).

5. Ram Narain and accused Nand Kishore @ Seth were examined as D.W. 1 and 2 respectively.

6. I have heard learned Counsel for the parties and perused the record of the Trial Court.

7. The Medical Report of the victim examined by P.W. 6 Dr. Arunima Srivastava-the general examination revealed-the girl child is of 27 kg Wt., Ht. 127 c.m., teeth 6/6; 6/6. pubic and axillary hairs absent. No injury seen over the body but due to internal bleeding her Salwar and lower side of the back flap of Kurta is soaked in blood.

Internal Examination:--Index finger passed with difficulty into the Vagina. There is a linear tear in the right wall of the Vagina.

Investigation--(1) Referred to the Dental Surgeon Memorial Hospital, Balrampur for exact Dental age of the child. (2) Referred to the Radiologist for X-ray of Rt. Elbow-Rt. Wrist for radiological evaluation of the age. (3) Vag. Smear prepared and sealed and sent to the Pathologist, Dufferin Hospital, Gonda. (4) Blood soaked clothes sealed and sent to Pachperwa, Kotwali.

X-ray report was given by Dr. O.P. Srivastava, Dental Surgeon (P.W. 7) and Dr. Y.P. Gupta (P.W. 8), Radiologist. Both the Doctors opined age of the victim to be 10-12 years.

8. The evidence adduced by Dr. Arunima Srivastava (P.W. 6) indicates that, looking to the report (Ext. "Ka"-8) of Radiologist and report (Ext. "Ka"-9) of Dental Surgeon and from physical appearance, the victim appeared to be of 12 years. She also stated that it could be in between 13-14 years as well. She also stated that she found blood oozing out from vagina. She has stated in her examination-in-chief that she was playing in front of house of Vishwanath, which is near to her house. Appellant Nand Kishore called her and took her to his house and committed sexual intercourse with her. She wept and raised alarm, she came to her house and narrated the whole incident to her father. This witness further stated that she was medically examined and her statement was recorded in Court. This witness was cross-examined but nothing could be evolved in favour of the defence.

9. For the narrowed compass of consideration in this case i.e. whether the accused was the rapist, the most decisive evidence is the testimony of the victim herself, none else will be more competent than her to tell the Court as to who raped her. The aforesaid materials, i.e. medical evidence and statement of the victim are sufficient to show, beyond any spec of doubt, that the victim was sexually ravaged by appellant Nand Kishore @ Seth.

10. The scrutiny of the total evidence as well as discussions made by learned Court below suggests that the learned Trial Court has analysed the evidence in a pragmatic manner and has reached to the correct conclusion. The learned Trial Court has wisely discussed and intelligently reached to the conclusion that the offence punishable under section 376 I.P.C. is made out against appellant Nand Kishore @ Seth.

11. Learned Counsel does not dispute the complicity of the appellant in the present crime but prays for considering the sentence awarded to the appellant by the Court below. In the present case, appellant Nand Kishore @ Seth has been sentenced for life for the offence committed by him. Thus, while considering the sentence, we have to bear in mind that the offence was committed after the enforcement of Criminal Law Amendment Act (CLAA) No. 43 of 1983. So the provision prescribing more rigorous sentence must apply if the offence falls within the purview of sub-section (1) of section 376, and then he "shall be punished with imprisonment of either description for a term which shall not be less than seven years". If the offence falls under sub-section (2)(f) "commits rape on an woman when she is under 12 years of age" the offender is liable to 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."

12. The question of age of victim is, therefore, important in this area. If she was below the age of 12, on the date of occurrence the minimum sentence would be rigorous imprisonment for 10 years.

13. P.W. 6, Dr. (Smt.) Arunima Srivastava in her cross-examination has stated that the victim could be of 13-14 years in age.

14. P.W. 8 Dr. Y.P. Gupta in his examination-in-chief has stated that the victim was less than 16 years and could be aged in between 10-12 years.

15. The Trial Court has given a finding, after considering the evidence of P.W. 6, P.W. 7, and P.W. 8, that the age of the victim was in between 10-12 years. The Trial Court ought to have weighed the evidence of age by considering the statement of P.W. 6 Dr. (Smt.) Arunima Srivastava given in her cross-examination where she had stated that the victim could be of 13-14 years of age and also the evidence of P.W. 8 Dr. Y.P. Gupta who stated in his examination-in-chief that the victim was less than 16 years. Therefore, we feel that it would not be unsafe if we say that the victim had crossed 12 years in age but was less than 16 years.

16. Learned Counsel for the appellant has made a serious endeavour to reduce the sentence to the sentence already undergone and to compensate the victim financially.

17. So far as the sentence in the present case is concerned, the Court has to strike a just balance. In the present case, the occurrence took place on 29.6.2004, i.e. ten years back, when the appellant was 23 years of age.

18. We are informed that the appellant has no other criminal antecedent. The appellant is in jail since 1.7.2004 and the record reveals that he has not come out from jail even for a single day. These are some of the factors which we need to take into consideration while imposing appropriate sentence on appellant.

19. Learned Counsel states that in view of the above special mitigating circumstance, which exists in favour of the appellant, this Hon"ble Court may take a sympathetic view of the matter.

20. In a reported case, [T.K. Gopal @ Gopi Vs. State of Karnataka](#), Hon"ble the Supreme Court observed in paras 13, 14, 15 & 18 as under:

"13. In the matter of punishment for offence committed by a person, there are many approaches to the problem. On the commission of crime, three types of reactions may generate: the traditional reaction of universal nature which is termed as punitive approach. It regards the criminal as a notoriously dangerous person who must be inflicted severe punishment to protect the society from his criminal assaults. The other approach is the therapeutic approach. It regards the criminal as a sick person requiring treatment, while the third is the preventive approach which seeks to eliminate those conditions from the society which were responsible for

crime causation."

"14. Under the punitive approach, the rationalisation of punishment is based on retributive and utilitarian theories. Deterrent theory which is also part of the punitive approach proceeds on the basis that the punishment should act as a deterrent not only to the offender but also to others in the community."

"15. The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy. [See: [Sunil Batra Vs. Delhi Administration and Others etc.](#), [Sunil Batra Vs. Delhi Administration and Others etc.](#), [Charles Sobraj Vs. Supdt. Central Jail, Tihar, New Delhi](#), and [Francis Coralie Mullin Vs. Administrator, Union Territory of Delhi and Others](#), .

"18. Here, in India, statutory provision for psychotherapeutic treatment during the period of incarceration in the jail is not available, but reformist activities are systematically held at many places with the intention of treating the offender psychologically so that he may not repeat the offence in future and may feel repentant of having committed a dastardly crime."

21. However, having regard to the extenuating circumstances pointed out by the learned Counsel in the instant case, especially, the fact that the appellant is in jail for complete ten years as on today, we feel that present period of incarceration is enough and he should not be made to further suffer the consequences of his bestiality.

22. In view of the law, as discussed above, and in view of the facts and circumstances of the case, we find that the ends of justice would successfully meet if the appellant is awarded punishment already undergone by him. The fine imposed by the Trial Court is upheld. The appellant shall pay the fine, if the same has not already been paid, within sixty days from the date of receipt of record by the learned Trial Court, which, shall, in turn, pay a sum of Rs. 7000/-, as compensation to the victim, without delay. In the event of default in payment of fine, the appellant shall have to undergo rigorous imprisonment for three years.

23. The Office is directed to send the lower Court record along with copy of the judgment to the learned Trial Court, without delay, so as to ensure that it reaches the learned Trial Court within twenty days from today. With the above observations, the appeal is disposed of, in such a fashion that it is partly allowed. The conviction is confirmed but the sentence is modified to the extent, as stated above.