

[AFR]  
**Reserved on 26.10.2021**  
**Delivered on 02.11.2021**

**Court No. - 37**

**Case :-** CRIMINAL APPEAL No. - 2436 of 2013

**Appellant :-** Rajiv @ Paji

**Respondent :-** State of U.P.

**Counsel for Appellant :-** S.K. Srivastava, Anuj Srivastava, Ravendra Singh, V.K. Srivastava

**Counsel for Respondent :-** Govt. Advocate

**Hon'ble Dr. Kaushal Jayendra Thaker, J.**

**Hon'ble Ajai Tyagi, J.**

**(Oral Judgment by Hon'ble Ajai Tyagi, J.)**

1. By way of this appeal, the appellant- Rajiv @ Paji has challenged the Judgment and order dated 6.5.2013 passed by court of Additional Sessions Judge, Court No.4, Saharanpur in Session Trial No.78 of 2013 arising out of Case Crime No.341 of 2012, under Section 376 Indian Penal Code, Police Station- Rampur Maniharan, District Saharanpur whereby the accused-appellant was convicted under Section 376 IPC and sentenced to imprisonment for life with fine of Rs.20,000/- and in case of default of payment of fine, to undergo further imprisonment for six months.

2. The brief facts as per prosecution case are that on 14.10.2012, a written report was submitted by Naseem stating therein that today in the morning his seven years old daughter ( victim) was playing with neighbour Ramesh's children. At about 1:00 p.m. Rajiv @ Paji, son of Ramesh, took her daughter to his house and tried to commit rape with her. A case crime No.341 of 2012 was registered at Police Station Rampur Maniharan under Section 376 IPC read with Section 511 IPC.

3. S.I.-Dheeraj Singh took up the investigation, visited the spot,

prepared site plan, recorded statements of the prosecutrix and witnesses. Medical examination of prosecutrix was conducted by the doctor.

4. After completion of investigation, charge sheet was submitted against appellant - Rajiv @ Paji under Section 376 IPC. The case being triable by Court of Sessions, was committed by concerned Magistrate to the Court of Sessions for trial.

5. The learned trial court framed charge against the appellant under Section 376 IPC. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charge, examined six witnesses, who are as under:-

1	Mohd. Naseen	P.W.1
2.	Imrana	P.W.2
3.	Km. Sahiba	P.W.3
4.	Dr. Renu Sharma	P.W. 4
5.	Arvind Kumar Singh	P.W. 5
6.	Dheeraj Singh	P.W. 6

6. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. in which he denied entire evidence against him and stated that he was innocent and had been falsely implicated. The accused did not examine any witness in his defence.

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-5
2.	Written report	Ext. Ka-1

3.	Recovery Memo of Clothes & Supurdinama	Ext. Ka-8
4.	Medical Examination Report	Ext. Ka-3
5.	Supplementary report	Ext. Ka-4
6.	Charge sheet (Mool)	Ext. Ka-12
7.	Statement U/s 164	Ext. Ka.2
8.	Site Plan with Index	Ex.Ka.10

**8.** Heard Shri Anuj Srivastava, learned counsel for the appellant, Sri Janardan Prakash, learned AGA for the State and also perused the record.

**9.** Perusal of record shows that occurrence of this case took place on 14.10.2012. The prosecution has alleged that the accused committed rape with seven years old daughter of complainant – Naseem. The victim's statement under Section 164 Cr.P.C. was recorded by the concerned Magistrate. During the course of investigation, medical examination of victim was conducted and the medical report was prepared. Dr. Renu Sharma, conducted the medical examination. She has stated in her evidence as PW-4 that there was laceration posterior of size 3 x 2 x 2 mm. Blood clot was present there which started bleeding on touching. Hymen was intact. Vaginal smear was sent for examination and according to supplementary medical report, no spermatozoa was found.

**10.** The victim was examined by prosecution as PW-3. In her statement recorded under Section 164 Cr.P.C., the victim supported the prosecution version. She was produced before the Trial Court as PW-3. In her statement before the Trial Court also, she supported the prosecution version. Her mother- Imrana -PW-2 also supported the case against accused.

**11.** Complainant- father of the victim, Naseem was produced as PW-1. He has proved the written report as Ex. Ka-1 which was submitted by him at police station for registration of the case against accused.

**12.** Learned counsel for the appellant tried to establish that as per FIR, this case was of an attempt to commit rape while on the basis of legal consultation it was led as the appellant was successful in committing the rape and the prosecution was conducted for the offence under Section 376 IPC.

**13.** Learned AGA submitted that the age of victim at the time of commission of offence was just seven years and as per the medical examination, she was found aged between 9-12 years. She has supported prosecution version in her statement and her testimony is supported with medical evidence. There is recovery of blood stained cloth of victim. It is also submitted that the appellant remained silent in his statement under Section 313 Cr.P.C. regarding the circumstances under which he was implicated in this case. Prosecution case is proved beyond doubt and accused is rightly convicted by the trial Court.

**14.** Learned Trial Court relied on the testimony of witnesses, mainly the testimony of victim coupled with medical evidence, convicted and sentenced the accused appellant for life imprisonment and fine under section 376 IPC.

**15.** After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for past more than 9 years.

16. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

*[375. Rape.- A man is said to commit "rape" if he-*

*(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*

*(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*

*(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*

*(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,*

*under the circumstances falling under any of the following seven descriptions :-*

***First.-*** *Against her will.*

***Secondly.-*** *Without her consent.*

***Thirdly.-*** *With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*

***Fourthly.-*** *With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

***Fifthly.-*** *With her consent when, at the time of giving such consent, by reason of unsoundness of mind of intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*

***Sixthly.-*** *With or without her consent, when she is under eighteen years of age.*

***Seventhly.-*** *When she is unable to communicate consent.*

***Explanation 1.-*** *For the purposes of this section, "vagina" shall also include labia majora.*

**Explnation 2.-** Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

**Exception 1.-** A medical procedure or intervention shall not constitute rape.

**Excpetion 2.-** Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

17. In **Mohd. Giasuddin Vs. State of AP**, [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

*"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."*

18. 'Proper Sentence' was explained in **Deo Narain Mandal Vs. State of UP** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case.

Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

19. In *Ravada Sasikala vs. State of A.P.* AIR 2017 SC 1166, the Supreme Court referred the judgments in *Jameel vs State of UP* [(2010) 12 SCC 532], *Guru Basavraj vs State of Karnatak*, [(2012) 8 SCC 734], *Sumer Singh vs Surajbhan Singh*, [(2014) 7 SCC 323], *State of Punjab vs Bawa Singh*, [(2015) 3 SCC 441], and *Raj Bala vs State of Haryana*, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is

therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

**20.** Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformatory and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

**21.** Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

**22.** As discussed above, 'reformatory theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system.

**23.** Learned AGA also admitted the facts that appellant is languishing in jail for the last more than 9 years. Keeping in view of theory of 'doctrine of proportionality' as discussed above, the sentence awarded to the appellant seems harsh. Since, the appellant

has already served 9 years of sentence and ends of justice would be met if sentence is reduced from life imprisonment to the period of ten years.

24. Hence, the sentence awarded to the appellant by the learned trial-court is modified and is reduced to ten years rigorous imprisonment. Imposition of fine and additional imprisonment in case of default of fine shall remain intact. Rs.15,000/- shall be paid as compensation to the victim out of the fine imposed as directed by learned Trial Court.

25. Accordingly, the appeal is **partly allowed** with the modification of the sentence, as above.

**Order Date:** 02.11.2021  
Mukesh