



2026:AHC:26622-DB

HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 1219 of 2016

Kamlesh @ Kharbar

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	: Arvind Kumar Kushwaha, Hemant Kumar Dubey, Pooja, Rajeev Kumar Singh Parmar
Counsel for Respondent(s)	: G.A.

Court No. - 42

HON'BLE SIDDHARTHA VARMA, J.

HON'BLE PRASHANT MISHRA-I, J.

1. This Criminal Appeal has been filed against the judgment and order dated 16/18.01.2016 passed by the Additional Sessions Judge/FTC, Kushinagar, Padrauna, in Sessions Trial No. 205/2012 arising out of Case Crime No. 279/2012 under Sections 363, 366 and 376 of the Indian Penal Code. In this case, the appellant was sentenced to 5 years of rigorous imprisonment and a fine of Rs. 5,000/- under Section 363 IPC, with an additional 3 months of rigorous imprisonment in case of default of payment of fine; 10 years of rigorous imprisonment and a fine of Rs. 20,000/- under Section 366 IPC, with an additional 6 months of rigorous imprisonment in default of payment of fine; and life imprisonment and a fine of Rs. 50,000/- under Section 376(2)(f) IPC, with an additional 12 months of rigorous imprisonment in default of payment of fine. All sentences are to run concurrently.

2. Upon an incident having taken place on 29.6.2012 at around 6:00PM, an FIR was lodged on the next day i.e. on 30.6.2012. In the FIR it was alleged by the first informant, who was the father of the victim, that the victim, who was 6 years of age, had been playing at his door-step and one Kamlesh @ Kharbar, the accused, had taken her away and when he heard the scream of his daughter i.e. the victim, he then retrieved her from the accused and, thereafter, the victim told him about the incident which had taken place. She had narrated to him that the accused had taken down her undergarment and had done something wrong with her. He had also stated

in the FIR that while the victim was being taken away by Kamlesh, the accused, his wife Vidhyawati and his brother Madan had seen her being taken away. He, thus, prayed for action.

3. Thereafter, the police got into action and retrieved the under garment and a recovery memo of it was prepared which was exhibited as Exhibit - Ka2. A medical examination was conducted on the victim on 30.6.2012 itself. By an x-ray, the age of the victim was determined. A supplementary medical report of the victim was also prepared on 30.6.2012 wherein an inference was drawn that the hymen was stretched and it appeared that an attempt of rape was made. The vaginal smear was also taken and a report was also submitted that it was negative vis-a-vis the presence of spermatozoa. However, the FSL report of the undergarment showed that there was spermatozoa present on the under garment.

4. Upon the investigation having been completed, the police submitted its charge sheet and the court thereafter framed charges on 14.2.2013 against the accused under Sections 376/511 IPC. Thereafter on 28.7.2015 additional charges under Sections 363 IPC and 366 IPC were also framed.

5. From the side of the prosecution as many as 8 prosecution witnesses, namely, Chhotey Lal, 'X', Vidhyawati, Subhash G Verma, Shambhu Nath, Dr. Nishant Abdi, Dr. Abdul Kalam and Devendra Prasad Tripathi were examined.

6. P.W. -1, Chhotelal was the father of the victim and he has consistently in his examination in chief submitted that while the victim was being taken away by the accused Kamlesh, his wife and his brother had seen her being taken away. In the cross-examination, he was consistent with what he had stated in the examination in chief. However, in the cross-examination, he had stated that there was no blood etc. on the undergarment. In the cross-examination by the defence, he consistently narrated what he had stated in the examination-in-chief.

7. P.W.-2, 'X', is the victim herself. After examining that she was understanding what she was stating in the court, the court took down her statement. She has stated that she was lured by giving Rs.100/- but she

had refused to take the same and, thereafter, the victim was forcefully taken away by the accused. When she had tried to shout, the accused tried to shut her mouth and then she had stated that he had tried to do something wrong after taking off her undergarment. She had also stated that she had screamed because of the fact that she was in pain. However, there was no blood etc. When she had shouted no one had appeared, however, subsequently her mother had turned up. She further stated that when her mother came, Kamlesh had run away. In the cross-examination, she had been consistent with what she had stated in the examination in chief. However, she had stated that when she was taken away no one had seen and when she shouted then her mother had come on the spot and thereafter Kamlesh had run away.

8. P.W.-3, Smt. Vidhyawati, is the mother of the victim. She has also stated somewhat the same facts as were stated by her husband i.e. the father of the victim. She however states that she had seen Kamlesh taking the victim and she had also stated that she had seen the accused run away from the place of occurrence. She had in her cross-examination stated that she had seen the accused with victim from around a distance of 15 feet and that was in the bajra field behind the Kali Temple. She had run to the spot upon hearing the screams of her daughter.

9. P.W.-4, Subhash Ji Verma, was the Investigating Officer, who had stated that he had been the Sub Inspector of the Police Station Ahirauli Bazar District - Kushinagar on 28.5.2012 and he had recovered the undergarment and had sent it for forensic investigation. In his cross-examination he has stated that he had taken the statement of the mother of the victim. When this prosecution witness was called to the Court again on 18.9.2015, he had stated about the report of the forensic laboratory and in his cross-examination by the defence, he had stated the manner in which he had submitted the charge sheet.

10. P.W.-5 is Shambhu Nath, the Head Constable, who had prepared the chick.

11. P.W.-6, Dr. Nishant Abdi, who had examined the victim for the first time at the Community Health Centre on 30.6.2012 at 1:45 PM and she had stated that at the time of medical examination, she had not found any

external injury. She had only found that the hymen was stretched, reddish and thin. She had also stated that even the tip of the finger could not be entered into the vagina and also the victim was not cooperating. For the determination of the age of the victim, the victim was referred for ex-ray. She had also stated that from the pathology report there was no spermatozoa found on the private parts of the victim. However, she had stated that because the hymen was stretched, reddish and thin there was every effort made to commit a rape. Upon the cross-examination, she had stated that the redness would continue for 5 to 6 hours after the incident.

12. P.W.-7, Dr. Abdul Kalam, the Pathologist District Hospital, Kushinagar, had done the pathology test of the vaginal smear and had found that there was no spermatozoa present.

13. P.W.-8, Devendra Prasad Tripathi, was on 30.6.2012 posted as Head Constable at the relevant station and was responsible for having prepared the site plan and before him the accused had surrendered.

14. The accused was questioned under Section 313 Cr.P.C. He answered all the questions and had stated that he had not committed any crime. The case was put to trial and thereafter when the Additional District and Sessions Judge/FTC, Kushinagar at Padrauna, on 18.1.2016 convicted and sentenced the accused to 5 years of rigorous imprisonment and to a fine of Rs. 5,000/- under Section 363 IPC, with an additional 3 months of rigorous imprisonment in default of payment of fine; 10 years of rigorous imprisonment and a fine of Rs. 20,000/- under Section 366 IPC, with an additional 6 months of rigorous imprisonment in default of payment of fine; and life imprisonment and a fine of Rs. 50,000/- under Section 376(2)(f) IPC, with an additional 2 months of rigorous imprisonment in default of payment of fine and it was directed that all the sentences were to run concurrently, the instant criminal appeal was filed.

15. Learned counsel for the appellant has chiefly argued that if the medical examination is seen then there is absolutely no injury on the external/private parts of the victim. He submits that if the hymen was stretched, reddish and thin then it was so found after almost 12 hours of the incident and the redness could have continued only for 5 to 6 hours of the incident. He thereafter had stressed much on the fact that the various

witnesses had stated the colour of the undergarment differently as maroon, white and red.

16. Learned counsel for the appellant relied upon the page 413 of *Parikh's Medical Jurisprudence* and submitted that in young children when the vagina is very small and hymen deeply situated, the adult penis cannot penetrate it and in cases where a man's organ may be forcibly introduced, there could be rupture of the vaginal vault and associated visceral injuries would be there.

17. Learned counsel for the appellant further relied upon Modi's Medical Jurisprudence and submitted that in girls under 14 years of age, the vaginal orifice is usually so small that it will hardly allow the passage of even the little finger through the hymen. He has also referred very fairly to the Medical Jurisprudence and has stated that in small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia.

18. Learned counsel for the appellant has referred to the various contradictions of the prosecution witnesses wherein he has submitted that though the father had stated that no one had seen when the victim was being taken, the mother was stating that she had seen the victim being taken.

19. Learned AGA, however, has opposed the appeal and has submitted that in the instant case there is the testimony of a child victim, who had testified before the Court as P.W. -2 and to disbelieve the child witness was a very difficult proposition. He had submitted that the child witness in so many words had stated that she, in fact, was picked up by the accused and, thereafter, taken to the bajra field where the dirty work was done on her. He has submitted that even though the complete work of the rape might not have been committed but definitely an attempt was made and when the doctor submits that the hymen was stretched, reddish and thin then definitely the crime was committed on the victim and if the crime was not committed then at least an attempt of rape was made.

20. Learned AGA submits that if there were minor contradictions like, the ones which have been highlighted by learned counsel for the appellant

that there were contradictions with regard to the fact as to whether the accused was seen by the mother of the victim or not takes a hindseat when the victim herself who is a small child comes to the court and testifies. Also, he submits that the colour of the garments was being mentioned differently by different witnesses then also the case would not get affected. Minor contradictions have to be ignored which the villagers cannot remember at the time of actually testifying in the court. He, however, lays much stress on the fact that a child witness had testified in the Court and, therefore, the child witness could not be disbelieved. He also submits that the undergarment as was found definitely had spermatozoa present on it and, in fact, the forensic laboratory report also suggests that spermatozoa was present on the under garments.

21. Having heard Sri Arvind Kumar Kushwaha and Ms. Pooja learned counsel for the appellant and Sri Amit Sinha learned AGA, we are of the view that the testimony of a child witness who was 6 years of age at the time of incident and 7 years of age at the time when she was testifying in the court cannot be lightly ignored. We are also of the view that the case as was taken by the prosecution is fortified by the forensic science laboratory result which stated that the garment did have spermatozoa present.

22. So far as the time, place and the occurrence of the incident is concerned, we are definitely of the view that the same has not been, in any manner, assailed by the learned counsel for the appellant. Thus, when we find that the statement of the P.W.-2 who was a child witness is not being rejected, we are of the definite view that the accused was guilty of making an attempt for committing the crime.

23. So far as the offence under Section 363 IPC is concerned, we are again of the view that the same was committed as the minor child was taken away from the possession of the lawful guardians. However, we are definitely of the view that no offence under Section 366 IPC was made out as the ingredients of Section 366 IPC are not made out from the evidence on record. Having found that an offence under Section 363 IPC was made out and also an attempt was made to commit offence of rape, we are of the view that the appellant was guilty of having had kidnapped the child and also of having had made an attempt to commit rape. The

incident is of the year 2012 and the definition of rape as it stands today was amended on 3.2.2013.

24. We are, thus, of the view that the judgment and order dated 18.1.2016 passed by the Additional District and Sessions, Judge/FTC, Kushinagar at Padrauna, Court requires to be modified to the extent that the accused shall now be considered guilty of the offence under Section 363 IPC and for the offence of having attempted to commit rape.

25. So far as the punishment part is concerned, the appellant be punished for 7 years for offence under Section 363 and for the offence under Section 376/511, he be punished with a punishment of 10 years. The period of incarceration already undergone shall also be adjusted.

26. The payment of Rs. 55,000/- shall be done to the victim as compensation within a period of six months. In the event it is not paid it shall be recovered as arrears of land revenue and shall be paid to the victim.

27. The criminal appeal is thus partly allowed.

28. Office is directed to return the trial court record as expeditiously as possible and notify this judgment to the trial court too.

(Prashant Mishra-I,J.) (Siddhartha Varma,J.)

February 6, 2026

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