



2026:AHC-LKO:20345

Neutral Citation No. - 2026:AHC-LKO:20345

Reserved on 26.02.2026

Delivered on 20.03.2026

**HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW**

CRIMINAL APPEAL No. - 1936 of 2004

Zafer Ali

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	: Rishad Murtaza, Nadeem Murtaza, Nusrat Jahan, Ramakar Shukla
Counsel for Respondent(s)	: Govt.advocate, Nusrat Jahan

Court No. - 28

HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

1. The present appeal, preferred under Section 374(2) of the Code of Criminal Procedure, is directed against the judgment and order dated 03.09.2004 passed by the Additional Sessions Judge, Fast Track Court-5 Lucknow in Sessions Trial No. 157/1996, arising out of Case Crime No.591/93, under Sections 363, 366, 376 Indian Penal Code (hereinafter referred to as "I.P.C.") registered at Police Station Ghazipur, Lucknow whereby the trial court convicted and sentenced the appellant Zafer Ali for seven years rigorous imprisonment under Section 376 I.P.C. and fine of Rs. 1000/- with default stipulation.

2. Heard Sri Ramaker Shukla, learned counsel for the appellant and Sri Shushil Kumar Pandey, learned A.G.A. for the State.

3. As per the prosecution case, on November 15, 1993, at 5:00 AM, daughter of the complainant, Ram Davan aged approximately 14 years went for a walk on Himalaya Road and did not return. The complainant suspected that Zafar Ali, who operated a motor repair garage in front of his house, had enticed and kidnapped his daughter. A written report (Tahrir) (Exhibit Ka-1) was submitted at Police Station Ghazipur on November 16, 1993, at 8:45 AM.

4. After lodging of the F.I.R. investigation proceeded. During the course of investigation, the Investigating Officer (hereinafter referred to as "I.O.") Sub-Inspector K.M. Srivastava, visited the place of occurrence, prepared a site plan (Naksha Nazri), and recorded the statements of witnesses and after collecting the evidence filed charge-sheet against the appellant under Sections 363, 366, 368, and 376 I.P.C..

5. After furnishing the necessary documents under Section 207 of the Cr.P.C., the case was committed to the Court of Sessions, from where it is made over to the Additional Sessions Judge, Fast Track Court-5 Lucknow for disposal in accordance with law. The trial court framed charge against the appellant under Section 363, 366, and 376 I.P.C..

6. In order to prove its case, the prosecution examined seven witnesses: Ram Davan (PW-1), Chandra alias Mira (PW-2), Head Constable Shambhu Dayal (PW-3), retired S.I. Kailash Mohar Srivastava (PW-4), Dr. G.P. Gupta (PW-5), Dr. Pramila Raja (PW-6), and Smt Maya Joshi (PW-7).

7. The prosecution produced several documentary evidences, including the Written Report (Exhibit Ka-1) , the Chick FIR (Exhibit Ka-3) and the School Transfer Certificate/Scholar Register (Exhibit Ka-10).

8. After closing the evidence of prosecution, the statement of the appellant-accused was recorded under Section 313 of the Code of Criminal Procedure (CrPC). The accused denied all allegations, claiming the witnesses gave false testimony and that he was being falsely implicated.

9. At the stage of defence, the accused did not present any ocular evidence. However, the defence submitted a list of 11 documents, including a photocopy of an application (A-18/1 to 11) allegedly written by the victim to the SHO of Ghazipur.

10. After having heard both the parties, the learned trial court passed the impugned judgment convicting the appellant-accused for seven years rigorous imprisonment under Section 376 I.P.C. and fine of Rs. 1000/- with default stipulation.

11. Feeling aggrieved and dissatisfied with the impugned judgment and order of conviction, the instant criminal appeal has been filed on the ground that the learned trial court has not considered the facts and evidence in the correct perspective and has passed the order in an improper manner. The findings recorded by the trial court are perverse and contrary to law.

12. Learned counsel for the appellant further submits that the medical evidence does not support the testimony of the prosecution witnesses. As per the medical report, the age of the prosecutrix was found to be between 18 to 19 years; hence, no offence under Section 376 I.P.C. is made out. There are major contradictions in the testimonies of the witnesses, and even the factum of recovery has not been clearly established. Despite this, on the basis of the same evidence, the appellant has been convicted of the charges levelled against him under Sections 376 of I.P.C. No independent witness was examined. The prosecutrix was a consenting party. Hence, the impugned judgment and order is liable to be set aside and the present appeal deserves to be allowed.

13. Per contra, learned A.G.A. has opposed the appeal and submitted that the prosecution has adduced sufficient evidence to prove the charges levelled against the accused. He further submits that, as per the academic certificates, the victim was a minor, and the learned trial court has also observed that she was a minor at the time of the alleged incident. Therefore, the question of consent has no significance and, consequently, on the basis of the testimony of the victim, the appellant has been convicted for the offence under Section 376 I.P.C. The finding recorded by the trial court is based on cogent, reliable, clinching and convincing evidence. There is no illegality or infirmity in the impugned judgment and order. The present criminal appeal is devoid of merit and is liable to be dismissed.

14. Upon hearing learned counsel for both the parties, the following point arises for determination in the present appeal: whether the trial court has committed legal error in convicting and sentencing the appellant-accused under Section 376 of I.P.C. ?

15. Before advertng to the fact, it is expedient to mention here that the alleged incident took place in the year 1993, and at that time the provisions under Section 375 I.P.C. had not been amended. Section 375 I.P.C., as it stood prior to its substitution by Act No. 13 of 2013, reads as under:

“A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

Firstly—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 or 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 sixteen years of age.

Explanation—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

16. In view of the above law and on perusal of material available on record, it reveals that crux of this appeal is that whether consent of the victim when the alleged incident occurred in the year 1993 has significance or not ?

17. The learned trial court, in the impugned judgment, observed that as per the academic record, the date of birth of the victim is recorded as 21.02.1979, and thus she was about 14 years of age at the time of the alleged occurrence dated 16.11.1993. However, the trial court also noted that during cross-examination, when the father of the victim was questioned regarding the age difference among his children, he gave contradictory answers. Further, as per the radiological examination, the age of the victim was assessed to be between 18 to 19 years. Dr. G.P. Gupta (PW-5), in his testimony, stated that the epiphyses near the knee and wrist were fused, and on that basis, he opined that the age of the victim was between 18 to 19 years. Despite this, the learned trial court, after analyzing the medical evidence and in light of the law laid down by the Hon'ble Apex Court, held that the age of the victim to be 16 years. On that basis, the trial court exonerated the appellant-accused of the offences under Sections 363 and 366 I.P.C., but at the same time convicted the appellant-accused under Section 376 I.P.C.

Here is it to be notable that learned trial court has discussed the statement of PW-1 Ram Dawan in detail, which runs from page 3 to 5 of the impugned judgment and categorically observed that documents submitted by the prosecution with regard to the date of birth of the victim are contradictory, therefore, the calculation stated by the father of the victim PW-1 Ram Dawan is not tenable, but at the same time learned trial court did not rely on the age determined by the Dr. G.P.Gupta PW-5, which was based on the radiological age of the victim. Surprisingly, in this case the victim has also stated, by moving an application, that her father has wrongly mentioned her age in Tehrir, while she is 18 years old. Lastly, learned trial court in its judgment observed that in view of the scrutiny made above, court comes to the conclusion that allegation against accused that *“on 15.11.2993 at about 5.00 A.M. he had kidnapped/abducted the victim from her lawful guardianship and she was below the age of 16 years and abducting/kidnapping was to compel her marriage, is not proved”*, therefore, he is acquitted of the charges under Section 363/366 of the I.P.C.

Thus from above conclusion, it is evident that learned trial court did not accept the age of the victim that she was below the age of 16 years at the time of alleged incident and the trial court further concluded that at the time of alleged incident, the age of the victim was below the 18 years, therefore, appellant-accused is held guilty for the offence under Section 376 of the I.P.C.

Since the age of the victim was held to be below 18 years and it is also held by the trial court that it is not proved that the victim was below the age of 16 years, therefore, the findings given with regard to the conviction under Section 376 of the I.P.C. against appellant-accused is contrary and erroneous, as the law under Section 376(5) and (6) I.P.C. provides that the consent of the victim is immaterial if she is below 16 years of age.

18. Here it is also to be notable that learned trial court has observed in the impugned judgment that there was love affair between accused and the victim and the victim herself from her own will left her house and Dr. Pramila PW-6 has opined that the victim was habitual for sexual intercourse.

19. Learned trial court also observed that it is true that the accused did not believe any force to establish the physical relation with the victim and as such in the medical report no injury was found on the person of the victim and the victim had written the love letter to the appellant, which was collected by the police/Station House Officer Ghazipur, from which it also reveals that the victim was a consensual party for establishing the physical relation.

20. Thus from the above observation, it transpires that on the one hand learned trial court has found that it is not proved that the age of the victim was below 16 years and on the other hand the trial court also observed that the age of the victim was below 18 years. It is also found that she was consensual party. She has left her parental home on her own will and she was also fell in love with the appellant-accused, thus if all the facts, evidences and circumstances of the case will be considered in its entirety, then I find that the finding given by the trial court with regard to the conviction of Section 376 I.P.C. on the basis that the victim was below 18 years, therefore her consent had no significance is erroneous because as law elucidated above, if the age of the victim is below the 16 years, then only her consent has no significance since the alleged occurrence is of the year 1993, but in the present case as per radiological opinion (Exhibit Ka-8) based on X-ray reports of the elbow, knee, and wrist is between 18 to 19 years then it does not come into the purview of Section 375(6) of the I.P.C., therefore, the consent of the victim would be significant as it is evident that consensual relationship was established with her will and consent and when she is major then her

consent will have the importance, therefore, the conclusion drawn by the trial court in this regard is perverse.

21. Thus in view of above, after analysis of facts, evidences and circumstances of this case in its entirety, in the light of aforesaid legal provision, I come to the conclusion that the trial court has erred passing the impugned judgment and order and the same is liable to be set aside.

22. In view of the aforesaid, the present criminal appeal is **allowed** and consequently, the judgment and order dated 03.09.2004 passed by the Additional Sessions Judge, Fast Track Court-5 Lucknow in Sessions Trial No. 157/1996, arising out of Case Crime No.591/93, under Sections 363, 366, 376 Indian Penal Code registered at Police Station Ghazipur, Lucknow convicting and sentencing the appellant Zafer Ali under Section 376 I.P.C. is hereby set aside.

23. The appellant-accused is acquitted of the charge under Section 376 of I.P.C. He is reported to be on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged. Further, he is directed to comply the provision of Section 437-A of the Cr.P.C. to the satisfaction of the trial court.

24. Let record of trial court be sent back to Court concerned along with copy of judgment and order for information.

(Pramod Kumar Srivastava,J.)

March 20, 2026

Arvind