

**(2022)07ILR A1186
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.05.2022**

BEFORE

**THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.**

Criminal Appeal No. 984 of 2015
connected with
Government Appeal No. 1774 of 2015

Manoj @ Bhorai	...Appellant	
	Versus	
State of U.P.	...Opp. Party	

Counsel for the Appellant:

Sri Sanjay Tiwari, Sri Adya Prasad Tewari, Sri Birendra Singh, Sri M.N. Pathak, Sri Ramesh Kumar Singh, Sri Sheo Shankar Tripathi, Sri Pawan Kumar Vishwakarma, Sri Vijit Saxena

Counsel for the Opp. Party:

Govt. Advocate

Criminal Law- Indian Penal Code, 1872- Section 376- Code of Criminal Procedure, 1973- Section 154- Delayed First Information Report- Section 157- Special Report to Magistrate- There is 68 days delay in lodging the F.I.R, but the lower trial court did not find it unnatural or unusual and found sufficient explanation of the delay-If causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending the copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by its reliable evidence.

Where the prosecution has satisfactorily explained the delay in lodging the first information report and there is nothing to suggest concoction, of a story, then the said delay will not adversely affect the case of the prosecution.

Juvenile Justice (Care and Protection of Children) Act, 2015- Section 94- Determination of age of Prosecutrix - The prosecutrix is the sole witness of kidnapping, abduction and rape. According to radiological examination report, she was found to be 18 years of age, but according to her High School Certificate her date of birth recorded is 03.05.1992, thus, she was aged about 17 years at the time of commission of crime.

As per the provisions of the juvenile Justice Act primacy has to be given to the high school certificate of the prosecutrix and not to the ossification test in order to determine her age, hence prosecutrix held to be minor on date of occurrence.

Quantum of Punishment- Doctrine of Proportionality- It is correct that accused is married and family person even his children might have been of victim's age or similar to the age of victim. He has committed the sexual offence upon the victim twice and this offence was committed to pressurize the victim and her family members to come on the table of compromise. In this regard, another criminal case has also been lodged against the appellant, thus the accused has taken law in his own hand and has also interfered in administration of justice. Therefore, an extreme lenient view cannot be adopted in favour of the accused-appellant but since he is the only bread earner of his family and his family and children are facing lot of problem, therefore it would be expedient in the interest of justice to reduce the sentence to some extent awarded under Section 376 I.P.C.-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, therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream- '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 Supreme Court, as discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system-Eight year's rigorous imprisonment and Rs.25,000/- fine under Section 376 I.P.C would meet the ends of justice.

As the criminal jurisprudence in our country is reformatory and corrective hence the accused/ applicant should be given an opportunity of reforming himself, however a balance requires to be struck between the nature and gravity of the offence with the quantum of the sentence awarded and undue sympathy should not prevail, hence sentence reduced to 8 years with fine. (Para 22, 24, 40, 42, 43, 44, 45, 46)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case Law relied upon:-

1. Ashok Kumar Vs St. of U.P. 2012 (78) ACC 320
2. Satpal Singh Vs St. of Har. 2011 (1) C.C.S.C 185 SC
3. Mukesh Vs St. for NCT of Delhi & ors., AIR 2017 SC 2161
4. Ashok Kumar Chaudhary Vs St. of Bih., 2008 (61) ACC 972 (SC)
5. Rabindra Mahto Vs St. of Jhar., 2006 (54) ACC 543 (SC)
6. Ravi Kumar Vs St. of Punj., 2005 (2) SCJ 505
7. St. of H.P. Vs Shree Kant Shekari, (2004) 8 SCC 153
8. Munshi Prasad Vs St. of Bih., 2002 (1) JIC 186 (SC).
9. Ravinder Kumar Vs St. of Punj., 2001 (2) JIC 981 (SC).
10. Sheo Ram Vs St. of U.P, (1998) 1 SCC 149
11. St. of Kar. Vs Moin Patel, AIR 1996 SC 3041.
12. St. of U.P. Vs Manoj Kumar Pandey, AIR 2009 SC 711 (Three Judges Bench).
13. Santosh Moolya Vs St. of Kar., 2010 5 SCC 445
14. Manoj Mishra @ Chhotkau Vs The St. of U.P 2001 0 Supreme Court (SC) 609
15. Mohd. Giasuddin Vs St. of AP, [AIR 1977 SC 1926],
16. Deo Narain Mandal Vs St. of UP, [(2004) 7 SCC 257
17. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

(Delivered by Hon'ble Umesh Chandra Sharma, J.)

1. We have heard learned counsel for the appellants, learned A.G.A for the State and perused the material available on record.

2. The present appeals have been filed against the judgement and order dated 24.01.2015, passed by Additional Sessions Judge/Court No. 3, Gorakhpur, by which the accused-appellant was sentenced under Section 376 I.P.C with Rigorous Imprisonment of ten years and fine of Rs.50,000/- out of which Rs. 25,000/- would be paid to the victim as compensation. In default, the convict will have to undergo simple imprisonment for twelve months. For the offence under Section 363 I.P.C, he was convicted and sentenced with Rigorous Imprisonment of one year and fine of Rs.1000/-. In default, the convict will have to undergo simple imprisonment for two months. For offence under Section 366 I.P.C, he has been convicted for rigorous imprisonment for three years and fine of Rs.5,000/- in case of default

six months R.I. was ordered. It was also ordered that the period spent by the convict in custody would be adjusted in his sentence and all the sentences shall run concurrently.

3. Smt. Munni Devi, Smt. Phoola Devi and Smt. Tirtha Devi summoned as accused under Section 319 Cr.P.C, were acquitted. Being aggrieved, the State has preferred the appeal no. 1774 of 2015.

4. In brief, grounds of Appeal No. 1774 of 2015, is that the learned Trial Court has given benefit of doubt or advantage to the acquitted respondents. The case under Section 364 is fully proved against them but the learned Trial Court disbelieved P.W 1 & P.W 2. The order of acquittal is illegal, unjustified and bad in the eye of law. The learned Trial Court has not properly appreciated the prosecution evidence and has decided the case on the basis of conjecture and surmises. The impugned judgement and order of acquittal is not sustainable and is liable to be set aside.

5. In brief, grounds of Appeal No. 984 of 2015, are that the appeal, the accused appellant has taken a plea that the prosecutrix and appellant were in love with each other and agreed to marry, but parents of the victim did not approve of their marriage, rather decided to marry the victim with another person. Thereafter, she left the house on 14.04.2009. Mother of the victim lodged first information report against the appellant and his family members. The appellant and his family members have previous enmity with the informant/complainant, therefore, being annoyed and prejudiced and on the dictates of informant, the prosecutrix has falsely implicated the appellant. It is a case of consent and no opinion about the rape can be given. As per the medical report the victim was 18 years old at the time of alleged incident. The F.I.R. is delayed by 68 days, which is not explained. There is no injury in the private part of the victim and it can be gathered that she is a consenting party. There are major and serious contradictions in the evidences of prosecution witnesses. Defence proved the enmity, and conviction is based on surmises and conjecture, therefore, the appeal be allowed and impugned judgment be set aside.

In brief, facts of the case is as follows:-

6. In the present case, First Information Report was got registered by mother of the prosecutrix Smt. Ishrawati, who is informant of the prosecutrix by way of an application addressed to the D.I.G of Police, Gorakhpur, in which she stated that earlier accused-Manoj had kidnapped her daughter. In this respect the case is pending. The accused was pressurizing the informant and her daughter to change their statement and for this he had beaten the prosecutrix and had also threatened to kill her after kidnapping. Information in this respect was given to the police station. On 14.04.2006 at about 16:00 p.m., when her daughter, was going to the new house situated near Vikas Bharati School, from her old house in Unaula Awwal, she became untraceable. She was searched everywhere but could not be found. The informant had given a missing report regarding the prosecutrix with the police station but no action was taken. It was suspected by the informant that the accused Manoj and his family members named in the application had kidnapped her daughter and have killed her.

7. The duty Constable registered F.I.R on 22.06.2009 and entered in G.D at Serial No. 10. Investigation was handed over to S.I Wasim Anwar Khan. During investigation, the Investigating Officer (I.O) recorded the statements of the witnesses, visited the place from where the prosecutrix was suspected to be kidnapped and prepared site map. On 11.09.2009, the I.O. was informed that the accused, Manoj is bringing the victim towards the railway station Unaula. The police party went towards the railway station. At about 17:00 hours, a man and a girl were seen coming towards the railway station. They were asked to stop on the signal of informer. The person fled away, leaving the prosecutrix of this case, so this person could not be arrested. On inquiry, the girl told her name and also told the police party that the person accompanying her was the accused - Manoj @ Bhurai, who had kidnapped her against her will on 14th April, when she was going from her old house in Unaula Awwal to new house situated near Vikas Bharati School. Accused Manoj had persuaded her and taken her with him, he had kept her with him at different places. Today, he was taking her to record her statement and to meet an

advocate, but was intercepted by police. A recovery memo was reduced into writing which was signed by the prosecutrix, I.O. and witnesses present, on the place of recovery.

8. The prosecutrix was medically examined on 12.09.2009. In her internal examination, she was found mentally fit, pubic hair and auxiliary hair were developed. Both breast were developed, a lump was found in her stomach about 12 cm/10cm size which was mobile. Her height was 150 cm weight 48 k.gm teeth 15/15. In her internal examination conducted with her consent, hymen was found old torn, margins irregular, vagina admitted two fingers easily. The mouth of cervix was closed, and the lump was in continuity with the cervix. She could not tell about her last months menstruation date. She was sent for radio-logical examination and ultrasound examination as well urine test. The medical examination report was prepared by the Dr. Mintu Kumari Sharma.

9. The Doctor, who had examined the prosecutrix medically, prepared a supplementary report on 21.09.2009 on the basis of pathological report, the pathological report number 154/14/09/2009 revealed that spermatozoa was not found. According to ultrasound report, she was pregnant for about 19 weeks and two days. According to the report of C.M.O, after her radio-logical examination, her wrist joints, knee joints and all the epiphysis were fused, she was about 18 years of age. According to the Doctor, no definitive opinion about rape could be given. The prosecutrix was produced before Magistrate and her statement under Section 164 Cr.P.C was recorded.

10. After completion of investigation, the investigating officer filed charge-sheet under Sections 364 & 376 I.P.C against accused Manoj only as the names of other accused, mentioned in the F.I.R was found to have been falsely implicated.

11. The Magistrate took cognizance and committed the case to the court of Sessions vide order dated 22.01.2010, from where it was transferred to Additional Sessions Judge 03rd, Gorakhpur, where charges under Sections 364 and 376 I.P.C was framed on date 18.05.2010 against accused-Manoj who pleaded not guilty and claimed trial.

12. Prosecution examined on oath, the informant as PW 1 Smt. Ishrawati, who is the mother of the prosecutrix, prosecution moved an Application under Section 319 Cr.P.C. to summon other persons accused i.e. Smt. Munni Devi, Smt. Phoola and Smt. Tirtha, named in the F.I.R. The application was allowed and they were also summoned for trial vide order dated 24.05.2012. These three accused were charged under Section 364 I.P.C vide order dated 26.07.2013. The accused pleaded not guilty and claimed trial.

13. The P.W 1 & PW 2 were again examined and cross examined. Prosecution further examined on oath, PW 3, Dr. V.P. Singh, who deposed of conducting radio-logical examination of the prosecutrix and preparing report, after X-ray of right elbow knee and wrist of the prosecutrix.

14. P.W 4 Dr. T.N. Jha deposed about the ultrasound examination of the prosecutrix and stated that he had conducted the ultrasound examination of the prosecutrix on 15.09.2009. Fetus which was mobile, was found in her uterus on the upper part of the placenta. There was placental fluid in the uterus. The heartbeat of the fetus was 142 per minute, weight 285 gms. The fetus was of about 19 weeks and two days. He proved his report and ultrasound examination report and also proved the ultrasound plates as material exhibits.

15. PW-5, is the Constable clerk who deposed and proved about registering the first information report on the basis of an application and making relevant entry in G.D.

16. PW-6 Dr. Mintu deposed about medical examination of the prosecutrix and also of preparing the examination report, referring the prosecutrix for pathological test and X-ray examination and ultrasound examination as well. She also deposed and proved the supplementary report regarding age and on the basis of pathological report, details of which have been mentioned earlier in this judgment.

17. PW-7 is the Investigating Officer, who deposed about the investigation of the case. He accordingly proved the recovery memo of the prosecutrix, the site plan and the charge-sheet.

18. PW-8 P.S. Tiwari, is the Constable clerk, who was posted in the office of D.I.G Police, where the informant submitted her application for registering first information report. He accordingly deposed and has proved the report, written by him and the entry in the general diary regarding the report.

19. In their statement under Section 313 Cr.P.C the accused have pleaded false implication due to enmity. They have stated that the witnesses of fact have deposed under pressure and also that the investigation was not fair, rather it was a paperwork done by the I.O. in office. No evidence in defence was produced except certified copy of a surety bond in case number 302/08 which is admissible in evidence being certified copy of public document but of no use and rest of the documents are photocopy documents, which have not been proved. Hence are not admissible in evidence.

20. We have heard learned counsel for the accused-appellant, learned A.G.A. for the State and perused the material available on record.

21. The following documentary evidences were produced proved and relied by the prosecution :

Exhibit 'ka' 1 : Written Tehrir by the informant Smt. Ishrawati, who is mother of the victim.

Exhibit 'ka' 2 : Recovery memo of the victim.

Exhibit 'ka' 3 : Statement of the victim under Section 164 Cr.P.C.

Exhibit 'Ka' 4 : Admit-Card of the Victim for High School Exam. 2007

Exhibit 'Ka' 5 : Registration of Victim of Class - IX, in which her date of birth is mentioned as 03.05.1912.

Charge-sheet.

Exhibit 'Ka' 5 : Copy of chik F.I.R.

Exhibit 'Ka' 6 : Radio-logical Report by P.W.3 Dr. V. P. Singh, Radiologist.

Exhibit 'Ka' 7 : Ultrasound report by P.w. 4 Dr. T.N. Jha, Radiologist

Exhibit 'Ka' 8 : Carbon Copy of G.D, regarding registration of case, P.W. 1.

Exhibit 'Ka' 9 : Medical Examination Report by P.W 6 - Dr. Mintu Kumari Sharma.

Exhibit 'Ka' 10 : Supplementary medical report.

Exhibit 'Ka' 11 : Map.

Exhibit 'Ka' 12 : Copy of G.D regarding recovery of the victim.

Exhibit 'Ka' 13 : Entry in G.D. regarding arrest of the accused on 25.09.2009.

Exhibit 'Ka' 14 : Charge-sheet.

Exhibit 'Ka' 15 : Chik F.I.R by P.W 8.

Exhibit 'Ka' 16 : Carbon copy G.D dated 22.06.2009, regarding lodging F.I.R.

Exhibit 'Ka' 17 : Missing report of original G.D.

Material Exhibit 1 : X-ray plate.

Material Exhibit 2 : Ultrasound film by P.W 4 Dr. T.N. Jha.

Material Exhibit 3 : Ultrasound film by P.W 4 Dr. T.N. Jha.

22. There is 68 days delay in lodging the F.I.R, but the lower trial court did not find it unnatural or unusual and found sufficient explanation of the delay. According to the informant P.W-1, she had informed the missing of the victim to the local police, but the police did not take any action, then she approached the D.I.G with an application upon which order was passed to register the case. Therefore, her F.I.R was lodged after 68 days of the incident. The lower court has held that in case of kidnapping or rape of a girl, the family members hesitate to approach the Police at the first instance because of the stigma prestige and honour of the family involved. Firstly, they try to search the victim and when they fail and no other option is left then, approaching the authority is the last option. In this respect the lower court has referred the ruling in **Ashok Kumar Vs. State of U.P. 2012 (78) ACC 320 - Satpal Singh Vs. State of Haryana 2011 (1) C.C.S.C 185 Supreme Court**, which support the observations of the lower court and the explanation given by the prosecution.

Following judicial precedents are also relevant in which principle regarding delay in lodging F.I.R has been propounded and have been held that *if causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending the copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by its reliable evidence : (Refer)*

1a. Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge bench).

1. Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 (SC).

2. Rabindra Mahto Vs. State of Jharkhand, 2006 (54) ACC 543 (SC).

3. Ravi Kumar Vs. State of Punjab, 2005 (2) SCJ 505.

4. State of H.P. Vs. Shree Kant Shekari, (2004) 8 SCC 153.

5. Munshi Prasad Vs. State of Bihar, 2002 (1) JIC 186 (SC).

6. Ravinder Kumar Vs. State of Punjab, 2001 (2) JIC 981 (SC).

7. Sheo Ram Vs. State of U.P, (1998) 1 SCC 149

8. State of Karnataka Vs. Moin Patel, AIR 1996 SC 3041.

In the following cases the Hon'ble Supreme Court has held that *normal rule that prosecution has to explain delay and lack of prejudice does not apply per se to rape cases*

(1). *State of U.P. Vs. Manoj Kumar Pandey, AIR 2009 SC 711 (Three Judges Bench).*

(2). *Santosh Moolya Vs. State of Karnataka, 2010 5 SCC 445.*

23. From the prosecution evidence, why this crime was committed has also become clear that accused Manoj had earlier kidnapped the prosecutrix and the case of kidnapping was pending against him and he was mounting pressure on the prosecutrix and the witnesses to give statement in his favour; and when the prosecutrix and her mother refused then the prosecutrix was kidnapped, abducted and raped by the accused-appellant to malign the honour of the victim, informant and her family.

24. In this case, the prosecutrix is the sole witness of kidnapping, abduction and rape. According to radiological examination report, she was found to be 18 years of age, but according to her High School Certificate her date of birth recorded is 03.05.1992, thus, she was aged about 17 years at the time of commission of crime. According to C.M.O. Report, she was above 18 years old. It is not proved from any evidence that she was above 18 years of age and was major at the time of commission of crime. According to the Juvenile Justice Act & Rules, the medical report shall be considered in the last if no other evidence is available regarding her date of birth. The lower court has held that the prosecutrix is aged about 17 years at the time of alleged incident. According to the accused-appellant, if the victim was kidnapped then why did she not even attempt to seek help during travelling to public places. In this regard, the lower court has given a plausible explanation that the victim was already kidnapped by accused-appellant earlier, therefore, she could have been in fear that she could not raise alarm and she might have accepted her fate in the hand of accused appellant. The finding reached by the lower court appears to be plausible and correct and as the girl belongs to village/rural background and she was earlier harassed by the accused, therefore, she could not dare to alert public during the course of travelling. It is also noteworthy that when the victim was recovered from the railway station Unaula, the accused appellant was also sitting with him, who fled away from the place and could not be arrested on the spot. From the medical evidence, it is also established that the victim became pregnant, which was the result of rape by the appellant-accused while she was unmarried.

25. The informant - P.W. 1 - Ishrawati, mother of the prosecutrix has clearly deposed that the accused and his family members were mounting pressure to compromise the earlier case of kidnapping of the victim by the accused, which is already pending in the Court and on refusal they had beaten her, against which a criminal case has been lodged.

26. P.W. 2 - Victim, prosecutrix has deposed that on 14.04.2009, at about 04:00 p.m. when she was coming to her new house from her old house then Smt. Phoola and Smt. Tirtha met her and asked her to sit in tempo, as they shall drop her at her house. On route, the accused and his wife Munni Devi joined them in tempo. When the tempo reached near victim's house, they did not drop her rather she was carried at the house of sister of the accused at Kampiarganj, where the accused and her sister locked her in a room and in the night accused forcibly raped her. Accused continuously threaten her that if she will not compromise the case, the victim and her sole brother will be murdered. According to the victim, the accused appellant kidnapped her and kept her in confinement for four months and 15 days. Thereafter, she promised to compromise if she is set free and brought to her house. On the way, when the victim and accused were coming to the house and reached Unaula railway station, she started crying then people caught the accused and approached the police, but before reaching the police, the accused ran away. Thereafter, she was taken by lady/female Police Officer at lady Police Station where rest formalities were completed. In her deposition, she has also proved her statement under Section 164 Cr.P.C. As per the statement of the prosecutrix, Lilawati sister of the accused appellant kept her in a house for about four and half months, but the police and Investigating Officer have not made Smt.

Lilawati accused under Section 368 I.P.C. Even application under Section 319 Cr.P.C was not moved. An application under Section 319 Cr.P.C was moved, against Smt. Tirtha Devi, Smt. Munni Devi and Smt. Phula Devi only, who are arrayed as co-accused. Smt. Munni Devi is the wife of the accused appellant. According to the statement under Section 313 Cr.P.C accused appellant - Manoj @ Bhorai was aged about 38 years on 19.04.2014, and was father of 5 -6 children. He was a family person and if he was a responsible family and social person, he ought to have known about his moral duties and followed the social norms. It is noteworthy that the victim was aged about 17 years.

27. Before the incident of this case, the accused Manoj @ Bhorai was also named accused in Case Crime No. 1071/07, u/s 363, 364, 366, 376 & 506 I.P.C. for kidnapping, abducting and raping this victim with other persons.

28. On the basis of the facts mentioned in appeal, the guilt of the accused is proved. It is noteworthy that the appellant was aged about 38 years and father of 5 to 6 children at the time of commission of crime and that the victim P.W.-2, Sandhya was a minor girl of 17 years. She had not consented ever for marriage and cohabitation with the accused.

29. In ground nos. 7, 9 & 11 of the appeal, which is quoted below, the appellant has confessed *the guilt:*

"7. Because, the appellant and Sandhya-prosecutrix love to each other and both of them agreed to marriage for their life peacefully, but the parents of Sandhya were not ready to solemnize the marriage of Sandhya and when the parents decided to marry her daughter, then her daughter Sandhya went with some person, they left the house without informing to the informant on 14.04.2009 and the mother of the prosecutrix lodged the F.I.R against the appellant and his family members.

9. Because, the medical examination shows that it is a case of consent and there is no injury on private parts of the body and no opinion about the rape can be given and according to medical report, the victim Sandhya was major. She was 18 years old at the time of incident.

11. Because, from the medial report it is clear that the private parts were well developed and there is no injury on the private parts of body and it can be said that she is consented girl."

The assertion of the accused has extracted above prove his guilt and commission of crime.

It would be proper to discuss the relevant provisions regarding kidnapping, abduction and rape as enumerated in I.P.C.

Section 359. Kidnapping and kidnapping of two kinds, kidnapping from India and kidnapping from lawful guardianship.

In this case the matter relates to kidnapping from the lawful guardianship about which a separate section 361 I.P.C has been enumerated, which is as under:

Section 361 in The Indian Penal Code;

361. Kidnapping from lawful guardianship.--Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Explanation.--The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person."

According to this Section, if a female is under 18 years of age and she is taken out of the lawful guardianship of her guardians without the consent is said to have kidnapped such minor or person from lawful guardianship.

Under Section 363 I.P.C.

Kidnapping from lawful guardianship is punishable offence. According to which, for the offence of kidnapping from lawful guardianship the accused shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

"Section 366 of The Indian Penal Code

This Section deals with the punishment for kidnapping, abducting or inducing woman to compel her marriage, etc.--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; I[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid]."

Section 375 relates to 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 persons; 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 persons; 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 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 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.

Explanation 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 to that fact, be regarded as consenting to the sexual activity.

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

Exception 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.]

Section 376 relates to Punishment for rape:-

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].

(2) Whoever,--

(a) being a police officer, commits rape--

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(i) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.--For the purposes of this sub-section,--

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);

(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

1[(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.]"

30. It is established from the aforesaid discussions that the prosecutrix was aged about 17 years at the time of commission of crime. It is also established that accused wanted to settle and compromise the previous offence as alleged to be committed by him in 2007, for which an F.I.R being in Case Crime

No. 1071 of 2007, under Sections 363, 364, 366, 376 & 506 I.P.C was lodged, which was pending and to settle the aforementioned case, the accused-appellant committed this offence again and the life of prosecutrix was made miserable and troublesome.

31. P.W 1 - Mother of the victim, P.W 2 - Victim has proved the manner as to when and from where she was kidnapped and taken away to Gorakhpur. It is established that the victim was an unmarried girl, who had no physical and sexual relation with any other person except accused. When she was recovered from the Railway Station Unaula and was medically examined, she was found to be pregnant for 19 weeks two days foetus. Earlier the grounds of appeal taken by the appellant in paragraphs no. 7, 9 and 11 has been quoted, which also proved the guilt of the accused has not been established that the victim was a consenting party and physical relation was established by the accused with her after obtaining her consent, thus, a minor girl was raped and was impregnated by the accused. From the grounds taken in the appeal, it reveals that accused impliedly admitted his guilt.

32. The accused is so immoral person that he kidnapped, abducted and raped a girl of 17 years of age while having own children of similar age group. Accused has a legally wedded wife and without divorcing her, in the memo of appeal he states that he loves the victim and both love each other and wanted to marry. He made a minor girl pregnant and ruined her future, for which he has no regrets. It is not proved that victim became pregnant from the contact of any other person than the accused. Accused stated that both love each other and being a consenting party, the victim had co-habitated with him.

33. In ground 9 of the appeal, accused has stated that there was no injury on the private part of the victim as she was a consenting party. In evidence victim has not accepted that she was a consenting party. She was under the control of accused, her body was used for the fulfilment of desire and lust of the accused. A minor girl of about 17 years of age was made pregnant by the accused, who was 38 years of age and was having a legally wedded wife and a father of 5 - 6 children. The prosecution has proved the contents of kidnapping, abduction and forceful rape by the accused. Had the victim been the consenting party, no case would have been filed about the earlier incident of 2007.

34. Being aggrieved, against the acquittal, the State of U.P. has preferred Appeal No. 1774 of 2015 against Smt. Tirtha, Smt. Munni Devi and Smt. Phula Devi, who were summoned under Section 319 Cr.P.C and these lady accused persons were charged under Section 364 I.P.C. The lower court has discussed at page no. 11 in the judgment as to why the prosecution case against these lady accused persons is not proved. In this regard, the lower trial court has relied upon the investigation of the I.O, who found them to be falsely implicated and also referred to the statement of victim P.W 2, who assigned only the role of sitting of these accused persons with her in three-wheeler. These facts have also come in her statement that these women forced her not to come out of the three-wheeler when the three-wheeler reached near her new house and also assisted in locking her inside the house of sister of Manoj. The lower trial court came to the conclusion that they had falsely been implicated due to previous enmity as the husband of Smt. Phoola Devi was surety of the accused and husband of Smt. Tirtha Devi was the witness in Crime No. 1/4 under Sections 324, 325, 452 & 506 of I.P.C. The third woman is the wife of Manoj. The lower trial court come to the conclusion that no wife would tolerate/cooperate with her husband in kidnapping the girl for the purpose of her husband marrying the kidnapped girl or for the purpose committing rape upon her. It is also noticed by the lower court that if these three ladies accused persons were with the prosecutrix till she reached the house of sister of the accused - Manoj, she did not cry or raise alarm even in the crowded area/places during the journey. So far as the role and alleged acquisition of lady accused persons is concerned there is no independent evidence except the evidence of the victim. None has come forward to corroborate that they saw the victim and the three lady accused persons on the alleged date and time in three-wheeler. I.O in additional statement of the prosecutrix under Section 161, Cr.P.C, has written that she was taken by the accused Manoj @ Bhorai alone and not by rest three ladies.

35. From the aforesaid discussions, it is proved that there is old enmity amongst the family of informant and the lady accused persons. The findings recorded by the lower trial court in this regard

appears to be reasonable and plausible, therefore, the prosecution has completely failed in proving the case of abduction or kidnapping of victim by the three lady accused persons. The victim was recovered on 11.09.2009 and her statement under Section 164 was recorded on 23.09.2009, in the meantime she was in contact of her parents, therefore, it can be concluded that the statement of the victim recorded under Section 164 Cr.P.C is not gospel truth and since all the accused ladies, whose family members were in aid to the accused earlier were named in the First Information Report and statements was recorded under Section 164 Cr.P.C.

36. Therefore, the appeal preferred by the State of U.P. against the female accused persons, has no force and is accordingly dismissed.

37. So far as the sentencing of main accused - Manoj @ Bhora is concerned, he has been awarded by the following sentences by the lower trial court :-

"(i) Under Section 376 I.P.C, ten years rigorous imprisonment and Rs.50,000/- fine out of which Rs.25,000/- is to be paid to the victim as compensation and if fine is not paid the appellant will have to under go additional simple imprisonment for 12 months..

(ii) Under Section 363 I.P.C, one year's rigorous imprisonment and fine of Rs.1,000/- , in default simple imprisonment for two months.

(iii) Under Section 366 Cr.P.C : three years rigorous imprisonment and Rs.5,000/- fine and in case of default six months rigorous imprisonment.

(iv) It was also ordered that period spent by the convict in custody has to be adjusted in his sentence and all the sentences run concurrently."

38. Learned counsel for the appellant has argued and requested that accused-appellant is an aged old person having children and wife, he is the sole earning member of his family they are facing problems in earning their livelihood.

39. Learned counsel for the appellant has relied upon the ruling in the Case of **Manoj Mishra @ Chhotkau Vs. The State of Uttar Pradesh 2001 0 Supreme Court (SC) 609**, wherein Hon'ble the Apex Court found no gang rape, but the victim was raped by the appellant alone. The accused was found guilty for the offence under Sections 363, 366, 376 I.P.C and Section 4 of POCSO Act. The victim was a minor girl and the accused had undergone sentence for more than eight years, therefore, the Hon'ble Supreme Court ordered to release the accused-appellant for the sentence undergone in jail. In this case the occurrence was occurred on 14.04.2006 when the POCSO Act was not into existence, therefore the accused had not been tried under the POCSO Act. Section 376 I.P.C has been amended w.e.f. 21.04.2018 providing minimum sentence of 10 years. Before this date, minimum sentence was seven years, but which may extend to imprisonment for life and shall also be liable to fine.

40. In this case the trial court delivered the judgement and sentenced the accused on 23.01.2015. Since then he (Manoj @ Bhora) is in jail. During the trial, he was in jail for four months three days, thus he is in jail for more than seven and half years. It is correct that accused is married and family person even his children might have been of victim's age or similar to the age of victim. He has committed the sexual offence upon the victim twice and this offence was committed to pressurize the victim and her family members to come on the table of compromise. In this regard, another criminal case has also been lodged against the appellant, thus the accused has taken law in his own hand and has also interfered in administration of justice. Therefore, an extreme lenient view cannot be adopted in favour of the accused-appellant but since he is the only bread earner of his family and his family and children are facing lot of problem, therefore it would be expedient in the interest of justice to reduce the sentence to some extent awarded under Section 376 I.P.C.

41. In **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]**, explaining rehabilitary & reformatory 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."

42. The term, '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.

43. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, Supreme Court referred its earlier judgments rendered in **Jameel vs State of UP [(2010) 12 SCC 532]**, **Guru Basavraj vs State of Karnataka, [(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.

44. 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, therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

45. 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

Supreme Court, as discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system.

46. This Court is of the opinion that eight year's rigorous imprisonment and Rs.25,000/- fine under Section 376 I.P.C would meet the ends of justice. The sentences and fine awarded under Sections 363 and 366 I.P.C may be kept intact. Out of the above commuted fine of Rs. 31,000/-, Rs. 25,000/- might be paid to the victim and rest Rs. 6,000/- might be deposited to the Government Exchequer. In case of non-payment of fine awarded under Section 376 I.P.C, the accused may undergo for additional 12 months, rigorous imprisonment.

47. Accordingly, following orders is passed with regard to conviction and sentence:-

The Criminal Appeal No. 984 of 2015 - *Manoj @ Bhora Vs. State of U.P.* is partly **allowed** with regard to the sentence awarded under Section 376 I.P.C and is **dismissed** withholding the conviction and sentence awarded under Sections 363 & 366 I.P.C. Accordingly, the conviction and sentence under Sections 363 and 366 I.P.C passed by the court below is affirmed and maintained. So far as the conviction and sentence under Section 376 I.P.C is concerned, on the basis of above discussions, this Court is of the view that the sentence awarded by the learned trial court is modified to the effect that the accused-appellant is awarded eight years R.I. and Rs. 25,000/- fine.

48. Out of the above commuted fine of Rs. 31,000/-, Rs. 25,000/- would be paid to the prosecutrix and rest fine of amount of Rs.6,000/- shall be deposited in Government Exchequer. In case of non-payment of fine under Section 376 I.P.C, the accused-appellant shall undergo additional twelve month's rigorous imprisonment. All the sentences shall run concurrently. Incarceration period of accused shall be adjusted as per existing rules.

The Government Appeal No. 1774 of 2015 - *State of U.P. Vs. Smt. Tirtha & Two Others*, is accordingly **dismissed**.

The Registry to return the Lower Court Record alongwith the copy of this order.
