

**Neutral Citation No. - 2025:AHC:72938-DB**

**Reserved on 28.04.2025**

**Delivered on 05.05.2025**

**Court No. - 45**

**Case :- CRIMINAL APPEAL No. - 369 of 2014**

**Appellant :- Afjal**

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

**Counsel for Appellant :- Amarnath Tiwari, Bala Nath  
Mishra, Girja Shanker Mishra, Noor Mohammad**

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

**Hon'ble Saumitra Dayal Singh, J.**

**Hon'ble Sandeep Jain, J.**

**Per: Sandeep Jain, J.**

1. This criminal appeal arises out of a judgment and order of conviction and sentence dated 09.01.2014, passed by Additional Sessions Judge, Court No. 5, Ghaziabad in Session Trial No. 1224 of 2012 (State Vs. Afjal and Another), arising out of Case Crime No. 1001 of 2011, under Sections 363, 366, 376 I.P.C., Police Station Sihani Gate, District Ghaziabad, whereby the appellant has been convicted for the offences under Section 363 I.P.C. and sentenced to undergo three years rigorous imprisonment with fine of Rs. 3,000/-. In default of payment of fine to undergo further rigorous imprisonment of six months, to undergo five years rigorous imprisonment with fine of Rs. 5,000/-, for the offence under Sections 366 I.P.C. and in default of payment of fine to undergo further rigorous

imprisonment for one year and under Section 376 I.P.C. the appellant has been sentenced to undergo life imprisonment with fine of Rs. 10,000/-, in default to undergo rigorous imprisonment of one year. All the sentences have been ordered to run concurrently.

2. Factual matrix of the case is that on 12.08.2011 the informant 'S' P.W.-1 had gone on her work and at that time her minor daughter, the victim aged about 12 years (examined as P.W.-5 in the trial Court) was along with informant's younger daughter S-1 (examined as P.W.-6 in the trial Court), then at about 05:00 p.m. accused appellant Afjal came to the informant's house and enticed the victim and took her away. The informant searched the victim but when she failed to trace her out, she was of the firm belief that the victim has been enticed by Afjal, Dheeru, Kapil and Makna. The victim was seen in the company of the above accused by Naseer Ahmad (P.W.-2) and this fact was told to informant by P.W.-2. The informant, after failing to trace the victim, has given a written tehrir (Ex. Ka-1) on 18.08.2011 at Police Station Sihani Gate, Ghaziabad, on the basis of which first information report (Ex.Ka-3) was registered on 18.08.2011 at 17:50 hours, being case crime no. 1001 of 2011, under Sections 363, 366 I.P.C. and a corresponding entry in the G.D. was made at serial no. 50 at 17:50 hours. The victim P.W.-5 was recovered on 22.08.2011 at 13:10 hours from near Jakheera Police Booth, Delhi on the information provided by informer. The Recovery Memo is Ex. ka-2.

The victim P.W.-5 was taken to District Women Hospital, Ghaziabad on 24.08.2011 for medical examination but she refused to get herself examined. Ultimately, the victim's mother consented for the medical examination of victim on 27.08.2011 and thereafter she was examined by Dr. Sushma Chandra (P.W.-4) on 27.08.2011 at 12:25 p.m. In the medical examination, no internal injury marks on any part of body or private parts was found. The hymen was found torn with pink edges, no bleeding was seen. The vagina of the victim admitted little finger with difficulty. Slides of vaginal smear were prepared for examination of spermatozoa. The medical examination report of the victim is exhibit ka-4.

3. The statement of victim P.W.-5, under Section 164 Cr.P.C., was recorded on 29.08.2011, which is exhibit ka-5, which reads as under:-

*"On 12.08.2011, there was fasting and at about 05:00 p.m. she was putting 'chhole' on the 'chulha' for boiling then Afjal came and sat on the 'Chaarpai'. He was saying, he was not able to sleep, he will sleep. At that time her younger sister S-1, who is nine years old, was present in house, who was watching T.V. in the neighbourhood tenant's house. The accused Afjal finding opportunity made her smell a cloth and when she awoke, then it was night. She asked where was she then was told that she was in Delhi. Thereafter, Kapil phoned, who told not to bring the girl to his house otherwise he will also be implicated. She instantly shouted and told Kapil uncle to take her from here, who told her that now she will remain here because they will go to jail because of her. Afjal had left her at his sister-in-laws (bhabhi) at Delhi. On the next day Afjal had returned back to his house. She was kept in Delhi for eleven days at Afjal's sister-in-law's house. Afjal had raped her without her consent. She had fled away on finding opportunity from Afjal's sister-in-law's*

*house in Delhi and in the way one person met her, who had dropped her at Jakheera Chowki, Delhi where her family members had reached along with the police. Afjal had sold her to his sister-in-law for Rs. 27,000/-. Afjal's sister-in-law (bhabhi) had told her that how she could let her go since Afjal had sold her. There is no fault of Dheeru. Dheeru had borrowed Rs. 200/- from her on the pretext that he was going to his village and on returning, he will repay. Thereafter, this incident had occurred with her. She has nothing more to say.”*

4. The victim P.W.-5's ossification test was conducted in the District Hospital, Ghaziabad on 23.08.2011. As per the report of C.M.O., Ghaziabad (Ex. Ka-9) dated 24.08.2011, on the basis of x-ray report (Ex. Ka-10) and her general appearance her age was determined to be about 14 years.

5. After investigation charge-sheet (Ex. Ka-7) was submitted by S.S.I. Ved Prakash (P.W.-7) against accused Afjal under Sections 363, 366, 376 I.P.C., against accused Kapil @ Kafeel under Sections 363, 366 I.P.C., on which cognizance was taken. Charge-sheet against accused D (juvenile) under Sections 363, 366 I.P.C. was submitted in juvenile Court. The trial Court had framed charges against accused Afjal under Section 363, 366, 376 I.P.C. and Kapil @ Kafeel under Sections 363, 366 I.P.C. on 03.10.2012, to which the accused had denied and pleaded not guilty and asked for trial.

6. In the trial Court, the prosecution has examined the following witnesses, who have proved the following documents:-

| Serial number | Public witness / name | Proved as Exhibit |
|---------------|-----------------------|-------------------|
|               |                       |                   |

|    |                                                   |                                                                                                                                                      |
|----|---------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. | Informant 'S' P.W.-1                              | Proved the Tehrir as Ex. Ka-1, recovery memo of victim as Ex. Ka-2                                                                                   |
| 2. | Naseer Ahmad P.W.-2                               | No document proved                                                                                                                                   |
| 3. | Head Constable 117, Yamuna Prasad P.W.-3          | Proved the check F.I.R. as Ex. Ka-3                                                                                                                  |
| 4. | Dr. Sushma Chandra P.W.-4                         | Proved the medical examination report of the victim as Ex. Ka-4                                                                                      |
| 5. | Victim- P.W.-5                                    | Proved her statement under Section 164 Cr.P.C. as Ex. Ka-5 and also identified her signature on recovery memo Ex. Ka-2                               |
| 6. | S-1 P.W.-6, victim's younger sister               | No document proved                                                                                                                                   |
| 7. | S.S.I. Ved Prakash P.W.-7 (Investigating Officer) | Proved site plan as Ex. Ka-6, Charge-sheet as Ex. Ka-7, G.D. entry no. 50 at 17:50 hours as Ex. Ka-8.                                                |
| 8. | Pawan Saxena C.W.-1                               | Proved the C.M.O. report of victim dated 24.08.2011 as Ex. Ka-9, x-ray report of victim as Ex. Ka-10 and x-ray film of the victim as material Ex.-1. |

7. Learned Amicus Curiae has submitted that the prosecution story is unreliable. The findings recorded by the trial court are against the evidence on record. The medical report of the victim is inconsistent with ocular evidence. The co-accused Kapil@Kafeel has been acquitted. The victim had left her house on her own sweet will. The F.I.R. regarding the incident was lodged belatedly after six days, which has made whole prosecution story unreliable. The appellant has been falsely implicated. With these submissions, it has been prayed that the appeal be allowed and the appellant be acquitted.

8. Per contra, Mr. L.D. Rajbhar, learned A.G.A. for the State has submitted that the prosecution story is trustworthy. The victim, aged about 12 years, was enticed from the lawful custody of her parents by the accused in the presence of victim's younger sister S-1 and the victim was seen in the company of accused by S-1 and Naseer Ahmad P.W.-2. Learned AGA has submitted that the informant P.W.-1 initially searched the victim and when she failed to trace her, then first information report had been lodged against the accused and others. Learned AGA has submitted that the victim's testimony is corroborated by the testimony of P.W.-1, P.W.-2 and P.W.-6. The victim P.W.-5 has also supported the prosecution case and her testimony inspires confidence. The trial Court has believed the entire prosecution story. The victim has also suffered injury on her private parts, which has been proved by Dr. Sushma Chandra P.W.-4. There is no reason to doubt the

prosecution story. With these submissions, it has been prayed that the appeal may be dismissed.

9. We have heard Sri Alok Ranjan Mishra, learned Amicus Curiae and learned A.G.A. for the State and have gone through the trial Court record.

10. The informant, 'S' P.W.-1 has stated in her examination-in-chief that on 12.08.2011 at about 05:00 p.m. she had gone to work in diamond company, new Ghaziabad and at that time victim (informant's daughter) aged about 12 years and 'S-1' (informant's younger daughter) aged about 10 years, were alone at her home. When at 06:00 p.m. she returned home from work, then was told by 'S-1' that Afjal had come, who had taken the victim with him. She was also told by 'S-1' that 'S-1' had gone out of the house and had seen three people standing, Dheeru, Kapil and Makna. She had searched the victim extensively but failed to trace her. On this very day, Naseer Ahmad had informed him in the evening that he had seen the victim being taken away by Afjal, Dheeru, Kapil and Makna. She searched for many days and then on 18.08.2011 had got written the report from an unknown person, when the victim could not be traced and given that application at P.S. Sihani Gate. She has proved the Tehrir given at the police station as Ex. ka-1. She has further mentioned that the victim was found at police booth Jakheera, Delhi where she had gone with the police and from where she had brought back the victim on 22.08.2011 to police station Sihani Gate. Thereafter, victim

was examined on 27.08.2011 at district women hospital, Ghaziabad. She has specifically mentioned that the victim was recovered by the police in her presence on 22.08.2011 after about ten days from police booth Jakheera and the police had prepared the Recovery Memo there, on which she had affixed her thumb impression, which she has proved as Ex.ka-2. In cross-examination, she has admitted that she has not seen the victim being taken away by the accused but had got registered the F.I.R. on the basis of information given to him by her daughter 'S-1'. She has further stated that she had searched the victim in all her relatives. She was suggested that the victim went with her own free will to which she has denied. She has also been suggested that the accused has been falsely implicated being neighbours, to which she has denied.

11. The prosecution has examined Naseer Ahmad as P.W.-2, who has stated in his examination-in-chief that about one and half year back at about 05:00 p.m. he was coming to his home after taking vegetables from Meerut Road then he had seen the victim going with Makna, Kapil, Afjal and Dheeru. He had called the victim and asked her where she was going. The victim had told her that she is going to bring bananas because it is Ramzan. In the evening victim's mother 'S' had come to him searching her, then he had told her that he had seen the victim going with Kapil, Afjal, Makna and Dheeru. Three - four days after the incident the police Sub-Inpsector had come and had enquired about the incident then he had told him about

the incident. P.W.-2 in his cross-examination has stated that he is illiterate. He is aged about 70 years. He had seen the victim on Meerut Road, near Frooti factory, when he was coming back after taking vegetables. His 'Jhuggi' is near the factory. The incident is of 05:00 p.m. He had known Afjal, Makna and Kapil prior to the incident. He had seen the victim going with above persons towards Delhi road. The victim is aged about 12 years. He had seen the victim from about ten yards and had called her. He had told the victim's parents on the same day at about 06:00 p.m, when they were searching her. That day, he had not observed 'roza'. About 45 minutes prior to 'roza iftar'; he had seen the victim.

12. The prosecution has examined H.C. 117 Yamuna Prasad as P.W.-3, who has proved the check FIR as Ex. ka-3. This witness has denied in cross-examination that he had dictated the FIR to the informant and has also denied the suggestion that he had registered the FIR ante time.

13. Dr. Sushma Chandra has been examined as P.W.-4 in the trial Court, who has stated in her examination-in-chief that on 27.08.2011 at 12:25 p.m. she had examined the victim. No external or internal injury was found on the victim. Hymen was torn and of pink colour from which blood was not oozing. Vagina was admitting a small finger with difficulty. She had taken vaginal swab for ascertaining the presence of spermatozoa. The victim's mother had given consent for examination of victim. This witness has proved victim's medical examination report as Ex. ka-4 and

has mentioned in her cross-examination that victim had previously come to her but had refused her examination but subsequently victim's mother had permitted her examination. The victim's hymen could have been torn 2-3 days prior to the examination. The victim's vagina was admitting one finger with difficulty, no fluid was being discharged from the vagina. She had not enquired anything from the victim. There is possibility that the hymen of girls can be torn while cycling, racing and during physical exercise.

14. The prosecution has examined victim as P.W.-5, who has stated in her examination-in-chief that, incident took place about 2 years back. At the time of incident she was observing Ramzan. Afjal came to his house at about 05:00 p.m. and had enticed her on the pretext of giving bananas and apple and taken her to Delhi. Makna was with him, who was standing outside in the lane. When the above persons took her at that time her younger sister 'S-1' was present. Afjal had left her at his sister-in-law's (bhabhi's) house at Delhi and had stayed there in the night and in the night, Afjal had committed rape upon her, without her consent. When she had objected then Afjal's sister-in-law had assaulted her with 'belan' and Afjal had forcibly committed rape on her. Afjal had taken her on the pretext of giving apple and bananas and had taken her forcibly in a 'tempo'. When in the morning she had told Afjal to take her back to her house then he had told her that she will remain there and had locked her in a room and went

away. Afjal's sister-in-law (bhabhi) had told her that Afjal had sold her for Rs. 28,000/- and had gone away. She must return that amount and then she can go. Afjal's sister-in-law had forced her to have sex with 2-3 people and when she refused, she was assaulted. Makna had not committed rape on her. Afjal's sister-in-law had told her to bath and then on the pretext of bathing, she had come out and asked an unknown person from where she will get a bus to Ghaziabad, then that person had left her at the police chowki, where the police personnel had enquired about her house, then she gave her father's mobile number to them and then they had phoned her father and then her mother along with 2-3 police personnel had come to the police chowki to take her back, from where the police personnel took her to police station, Ghaziabad and she was kept for 2-3 days in the police station. Her statement was recorded by the police and she was examined by the doctor, in her mother's presence. Her statement was also recorded by the Magistrate. The victim has proved her statement under Section 164 Cr.P.C. as Ex. ka-5 and has also identified her signatures on Recovery Memo Ex. ka-2. In the cross-examination the victim P.W.-5 has mentioned that she was made to smell the cloth in the tempo and was taken from her house by Afjal. Makna was standing outside the house. Both took her in a tempo in which none was present. She does not remember the name of Afjal's sister-in-law (bhabhi), and the place where she resides in Delhi. She remained with Afjal's sister-in-law for 11 days, where 5-6 persons committed rape on her. She

had told the I.O. that Afjal had also committed rape on her. Afjal had committed rape on her, one day prior to the date of enticing her. She had not told her parents regarding rape. She had not consented to the rape and had not told her parents due to fear. Afjal resides one room away from her house and this fact was told to the Magistrate. If that is not there in her statement, then she can not tell the reason. Prior to Afjal, none had committed rape upon her. When Afjal had committed rape upon her, she was about 12 years old and she suffered pain at that time but had not taken any medicine. When Afjal had taken her away then her mother was on duty and father had gone with vehicle. Her mother works in Ghaziabad at Sihani Chungi. She does not know Dheeru. Dheeru lives nearby Afjal. It took about 20-25 minutes to reach the tempo from her house. When she had boarded the tempo then Kafeel was also present. When she was going with Afjal and Makna then she had been called by Naseer Ahmad, who had asked her where she was going. Naseer Ahmad was standing in crowd. Naseer Ahmad works with his father as such she calls him maternal grand father (nana). This victim has denied the suggestion in the cross-examination that no rape has been committed on her and she has falsely implicated Afjal.

15. The prosecution has examined victim's younger sister 'S-1' as P.W.-6, who has mentioned in her examination-in-chief that about one and half year back she was in her house with the victim then Afjal had come to the house,

whom she knew previously, who had taken the victim on the pretext of giving her bananas and apple. She had told this to her mother. She had told the I.O. regarding the incident. In cross-examination she has stated that the victim is three years elder to her. Today she is aged eleven years. She knows Afjal because he had come to her house. Prior to that, she did not know him. The day Afjal took her sister with him, the same day she had told her parents about that incident. Afjal had come alone.

16. The prosecution has examined S.S.I. Ved Prakash as P.W-7, who has investigated this case. The I.O. has recorded the statements of the witnesses under Section 161 Cr.P.C., has proved the site map as Ex. ka-6, has arrested accused Afjal on 19.08.2011 and recorded his statement. On 21.08.2011 accused Kafeel and Dheeru @ Vineet were arrested. On 22.08.2011, on the informer's information, the informant and the victim's father along with police had recovered victim from near police booth Jakheera. This witness has identified his handwriting and signature on the Recovery Memo Ex. ka-2. This witness has got recorded the statement of victim under Section 164 Cr.P.C. on 29.08.2011 and after investigation had submitted the charge-sheet against the accused persons, which has been proved as Ex. ka-7. This witness has also proved the G.D. entry no. 50 at 17:50 hours dated 18.08.2011 as Ex. ka-8. This witness has mentioned in his cross-examination that the victim has not been recovered at the instance of

accused but has been recovered on the informer's information.

17. Pawan Saxena has been examined as C.W.-1, who has identified the signature of doctor S.P. Singh, the then C.M.O. Ghaziabad, on the C.M.O. report of the victim and has proved it as Ex. ka-9. This witness has also proved the x-ray film of victim as material Ex.-1 and x-ray report as Ex. ka-10.

18. The appellant- Afjal in his statement under Section 313 Cr.P.C. has denied the prosecution story and has stated that he is innocent who has been falsely implicated.

19. The Hon'ble Apex Court in the Case of ***Satyapal v. State Of Haryana, (2009) 6 SCC 635*** has held that delay in lodging the first information report in a rape case is a normal phenomenon. Ordinarily the family of the victim would not intend to get a stigma attached to the victim.

20. The Hon'ble Apex Court in the Case of ***State of Himachal Pradesh Vs. Prem Singh (2009) 1 SCC 420*** has held that the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the F.I.R.

21. The Hon'ble Apex Court in the Case of *Satpal Singh Vs. State of Haryana (2010) 8 SCC 714* has held that delay in lodging F.I.R. in sexual offences has to be considered with a different yardstick. In case of sexual offences, the criteria may be different altogether. As honour of the family is involved, its members have to decide whether to take the matter to the Court or not. In such a fact situation, near relations of the prosecutrix may take time as to what course of action should be adopted. Thus, delay is bound to occur.

22. From the evidence of informant, 'S' P.W.-1 it is evident that at the time of incident she was not present at her house and she was told about the incident on 12.08.2011 at about 06:00 p.m. by her younger daughter 'S-1' P.W.6, when she had returned to her house. The informant has specifically mentioned in her examination-in-chief that she searched the victim for many days and also searched her with all her relatives and when she failed to trace her, then on 18.08.2011 she had given a tehrir Ex. ka-1 at police station on the basis of which FIR was registered. The informant is an illiterate lady.

23. It is evident that she had searched the victim for many days and when she failed to trace her, then she had got the FIR registered on 18.08.2011 i.e. six days after the incident. From the law laid down by the Hon'ble Apex Court, it is evident that delay in lodging FIR in rape cases is natural, since the honour of the family is involved and in this situation the family members deliberate on the

steps that are to be taken and this takes time and as such, delay in lodging FIR in rape cases is to be assessed on a different yardstick. In view of this, it can not be said that the informant had deliberately lodged the FIR belatedly. The trial Court has also believed the prosecution story and has held that the prosecution has been able to explain the delay in lodging the FIR. There is no other cogent reason for this Court to take a different view in this matter. As such, we are of the opinion that there is no force in the submission of learned Amicus Curiae that delay in lodging the FIR in this case, makes the prosecution story doubtful.

24. From the evidence of informant 'S' P.W.-1, it is evident that she is not an eye-witness of the incident. She was not present at the time of incident and as such she has not seen the victim being enticed and taken away from her home by the accused. In fact, P.W.-1 has been informed about the incident by her younger daughter 'S-1' P.W.-6. P.W.-6 has mentioned in her examination-in-chief that at the time of incident she was present with the victim then Afjal had come, who was known to her from before, who had enticed the victim on the pretext of giving her banana and apple and she had told this to her mother. P.W.-6 has identified the accused Afjal in the Court. At the time of giving evidence in Court on 13.03.2013, which is about one and half year after the incident, P.W.-6 has stated her age to be 11 years. Nothing incriminating has been elicited from P.W.-6 in her cross-examination so as to render her testimony

untrustworthy. The testimony of P.W.-6 inspires confidence. Similarly, Naseer Ahmad P.W.-2 has also mentioned in his examination-in-chief that on the day of incident at about 05:00 p.m. she had seen the victim with accused and had also asked the victim where she was going and the victim had told her that she was going to get the bananas, since it was Ramzan. P.W.-2 has mentioned that the victim's mother P.W.-1 had come to him in the evening and then he had told her about the incident. P.W.-2 has mentioned in his cross-examination that he had seen the victim when he was coming back after obtaining vegetables near the frooti factory on Meerut road and he knew the victim since three years prior to the incident. P.W.-2 has also mentioned that the victim is about 12 years old and he had seen the victim from a distance of about 10 yards and had told the victim's parents about the incident at about 06:00 p.m. on the same day. Nothing incriminating has been elicited from P.W.-2 in his cross-examination so as to make his testimony untrustworthy. From the combined evidence of P.W.-2 Naseer Ahmad and 'S-1' P.W.-6, it is evident that the victim was enticed by accused on the pretext of getting her banana and apple.

25. From the evidence of victim P.W.-5, it is evident that at the time of incident Ramzan was being observed and then the accused Afjal had come to her house and on the pretext of getting her bananas and apple, taken her to Delhi and at that time Makna was standing outside her

house in a lane and her younger sister 'S-1' P.W.6 was also present. The victim has specifically mentioned in her examination-in-chief that accused took her to his sister-in-law's (bhabhi) house in Delhi, where in the night Afjal had committed rape upon her, without her consent, and she was taken from her house forcibly in a tempo. The victim has proved her previous statement under Section 164 Cr.P.C. as Ex. ka-5. There is no material inconsistency between her previous statement under Section 164 Cr.P.C. and her substantive evidence recorded in the Court. The victim has mentioned that she was made to smell a cloth in the tempo and thereafter Afjal took her to his house, where Afjal's sister-in-law (bhabhi) was present. The victim has mentioned that when she was raped by Afjal, she was about 12 years old and at the time of rape she had suffered pain in her vagina but had not taken any medication. The victim has also mentioned that when she was going with the accused, she was called by Naseer Ahmad P.W.-2.

26. Learned Amicus Curiae has submitted that the medical report of the victim does not corroborate her testimony, but this is not correct. As per medical examination report Ex. ka-4 of the victim, which has been proved by Dr. Sushma Chandra P.W.-4, no injury was found on the body and private parts of the victim but the victim's hymen was found torn having pink colour edges. The vagina of victim was admitting little finger with difficulty. In the ossification test of the victim her radio-logical age has

been determined to be about 14 years. The then C.M.O. Ghaziabad Dr. S.P. Singh had retired, who could not be traced, as such the medical examination report prepared by the then C.M.O. has been proved by C.W.-1. The victim's mother P.W.-1 has stated that the victim was about 12 years old on the date of incident. This is not the case of accused/appellant that the victim was major on the date of the incident and she had eloped with the appellant with her own sweet will. There is absolutely no doubt that the victim was minor on the date of incident, as such the consent of the victim has got no relevance in this case. The accused has suggested the informant P.W.-1 in her cross-examination, that the victim had gone with the accused with her own sweet will, to which P.W.-1 has denied.

27. From the evidence on record, it is evident that the incident took place in the month of Ramzan and the accused took the victim away from her house on the pretext of getting her banana and apple. It is evident that the victim was enticed and taken away from the lawful custody of her parents on a false pretext of getting her banana and apple, which amply proves the motive of the accused. No evidence whatsoever is available on record to suggest that the victim was major on the date of incident, who had gone with her sweet will, with the accused. No evidence has also been led by the accused on this point. Regarding rape, the victim P.W.-5 has specifically mentioned that she was raped by accused without her

consent and this fact has been corroborated from the testimony of doctor P.W.-4, who has mentioned that the victim's hymen was found torn. The doctor P.W.-4 has mentioned in her cross-examination that it is possible that victim's hymen could have been torn about 2-3 days back, but it is well settled, that the doctor's evidence is only advisory in nature and where trustworthy ocular evidence is available, then that ocular evidence has to be given precedence. The Hon'ble Apex Court in the case of ***Vishnu Vs. State of Maharashtra (2006) 1 SCC 283***, has held that expert medical evidence is not binding on ocular evidence. Opinion of medical officer is to assist the Court as he is not witness of fact and evidence given by medical officer is of advisory character and not binding on witness of fact. In view of this, the doctor's opinion that the hymen of the victim could have been torn 2-3 days prior to her examination, can not over-ride and make the testimony of the victim, unreliable.

28. Learned Amicus Curiae has also submitted that no spermatozoa has been found in the vaginal smear of the victim. The Hon'ble Apex Court in the case of ***Ram Kripal Vs. State of M.P. (2007) 11 SCC 265*** has held that the *sine qua non* of the offence of rape is penetration and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. In this case, victim P.W.-5 has specifically mentioned in her examination-in-chief and cross-examination that she was raped by the accused appellant. It is not essential for the

prosecution to prove that the accused ejaculated during rape. If the prosecution proves that the accused has penetrated the vagina of the victim with his penis, then the accused is liable to be punished for the offence of rape. In view of this, it is not essential for the prosecution to prove that spermatozoa were present in the vaginal smear of the victim. The Hon'ble Apex Court in the case of *Prithi Chand vs. State of Himachal Pradesh, AIR 1989 SC 702* and *Narayanamma Vs. State of Karnataka, (1994) 5 SCC 728* has held that mere absence of spermatozoa in vaginal smear cannot cast a doubt on the correctness of the prosecution case. In light of the above law laid down by the Hon'ble Apex Court, absence of spermatozoa in the vaginal smear of the victim, does not make the prosecution story doubtful.

29. We have gone through the evidence on record and considered the arguments put up by the learned Amicus Curiae. On independent appreciation of evidence of the prosecution witnesses, as analyzed herein before, we are of the opinion that the prosecution story inspires confidence. The evidence of the victim and the corroborative evidence of informant 'S', P.W.2 and P.W.6 is reliable and trustworthy. The learned trial Court has appreciated the prosecution evidence rightly and has committed no legal error in coming to the conclusion that the minor victim was enticed and taken away forcibly from the lawful guardianship of her parents and thereafter the accused had committed rape upon her. The trial Court has

rightly convicted the accused Afjal for committing offence under Section 363, 366 and 376 I.P.C.

30. Learned Amicus Curiae has submitted that for offence under Section 376 I.P.C. the appellant has been sentenced to undergo life imprisonment by the trial Court, which is excessive. The appellant has already undergone a sentence of about 13 years in jail, as such his sentence for offence under Section 376 I.P.C. be reduced to the period already undergone in jail.

31. The Hon'ble Apex Court in the case of *State of Rajasthan vs. Madan Singh (2008) 5 SCC 147*, has held that both in cases of sub-sections (1) and (2) of Section 376 I.P.C. the Court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for adequate and special reasons. If the Court does not mention such reasons in the judgement, there is no scope for awarding a sentence lesser than the prescribed minimum. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law that is required to be achieved by imposing an appropriate sentence. In this case,

the trial Court had awarded sentence of 10 years, which was reduced by the High Court to 7 years, which was set aside by the Hon'ble Apex Court and the sentence imposed by the trial Court was restored.

32. We have considered the submission of the learned Amicus Curiae on reduction of sentence awarded by the trial Court to the accused for committing offence under Section 376 I.P.C. We are in agreement with the sentence imposed by the trial Court on the appellant under Section 363, 366 I.P.C. but the appellant has been convicted under Section 376 I.P.C. with life imprisonment and a fine of Rs. 10,000/- and in default to undergo rigorous imprisonment of one year. In the present case the appellant has till date suffered incarceration of about 13 years in jail. At the time of commission of offence, the accused was about 35 years old. The minimum sentence for offence of rape is 7 years which can be extended upto 10 years or for life imprisonment. The age of the victim was not under 12 years at the time of offence. In view of the above facts, the trial Court has awarded excessive sentence of life imprisonment for offence of rape. We are of the considered opinion that the punishment awarded to the accused for the offence of rape requires reduction and in the facts and circumstances of this case, if the accused is sentenced with the period already undergone in jail and to compensate the victim, if the fine imposed on the accused is enhanced from Rs.10,000/- to Rs.50,000/- and in default the accused is ordered to undergo a further rigorous imprisonment of

one year from today, then it will meet the ends of justice. Accordingly, the sentence imposed by the trial Court under Section 376 I.P.C. is modified and reduced to the period already undergone by the accused in jail but the amount of fine is increased from Rs.10,000/- to Rs.50,000/-, in default to undergo rigorous imprisonment of one year. The sentence of the trial Court under Section 363, 366 I.P.C. and the fine imposed under Section 363, 366 I.P.C. is maintained. To this extent, the appeal deserves to be **partly allowed.**

33. The appellant- Afjal, who is on bail, is directed to deposit the total fine amount of Rs. 58,000/- (Rs.50,000/- under Section 376 I.P.C., Rs.3,000/- under Section 363 I.P.C. and Rs.5,000/- under Section 366 I.P.C.) in trial Court within one month from today, failing which, he is directed to surrender in the trial Court to undergo the default sentence of rigorous imprisonment of one year awarded by the trial Court, and affirmed by this Court, in accordance with law.

34. The fine imposed aforesaid, if deposited by the appellant, be given to the victim by the trial Court in accordance with law.

35. Learned Amicus Curiae may be paid Rs. 25,000/- by the High Court Legal Services Committee, Allahabad High Court for his assistance to the Court, within two weeks.

36. A copy of this judgment be sent to the trial Court for compliance. Office is directed to send back lower Court record forthwith.

**Order Date :- 5.5.2025**  
SK Srivastava/Jitendra

**(Sandeep Jain, J.)**

37. I agree.

**(S.D. Singh, J.)**