



2026:AHC-LKO:23345-DB

**HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW**

CRIMINAL APPEAL No. - 407 of 2019

Nirmal KumarAppellant(s)

Versus

State of U.P.Respondents(s)

Counsel for Appellant(s) : Rama Niwas Pathak, Sudhir Kumar
Pandey, Syed Raza Mehdi
Counsel for Respondent(s) : Govt. Advocate

**Judgment Reserved on : February 05th, 2026
Judgment Delivered on : April 03rd, 2026**

Court No. - 1

**HON'BLE RAJAN ROY, J.
HON'BLE BRIJ RAJ SINGH, J.**

(Per : Rajan Roy, J.)

1. Heard Shri Rama Niwas Pathak, learned Counsel for the appellant and Shri Vimal Kumar Srivastava, learned Additional Advocate General alongwith Shri Raj Deep Singh, learned A.G.A-I for the State.

2. This is an appeal under Section 374 (II) of the Cr.P.C. against the judgment and order dated 05.10.2018 passed by Additional Sessions Judge/ Fast Track Court-I, Faizabad in Sessions Trial

No.46 of 2011; *State vs. Nirmal Kumar* arising out of Case Crime No.768 of 2010 convicting the appellant Nirmal Kumar for the offence under Section 376 IPC and sentencing him to undergo rigorous life imprisonment along with a fine of Rs.50,000/-, and in default of payment of fine, to undergo one year additional imprisonment.

3. The prosecution case in nutshell is that father of the victim had gone out in connection with work for about a week. His mentally challenged daughter, aged about 14 years, was alone in the house. The neighbour (appellant Nirmal Kumar) enticed her (the victim) to his house and raped her. He also extended death threats to her. When the father returned to his house a day before lodging of the FIR, his daughter informed him about the rape. On the date of lodging of FIR the father had gone to Tehsil Rudauli. He returned to his house at 4 p.m., by then, his daughter had died. The incident of rape is of 20.09.2010. An FIR (Ex.Ka-5) was lodged against the appellant for the offence under Sections 376, 302, 506 IPC, on 23.09.2010.

4. Body of the deceased was subjected to post mortem on 24.09.2010 at 3 p.m. by Dr. R. Dwivedi (P.W.5), the Autopsy Surgeon. The post mortem report is Ex. Ka-2. According to it, no marks of injury were found on her private parts. A whitish discharge in the vaginal canal was detected and swab was taken. Cause of death could not be ascertained, as such, viscera was preserved.

5. Vaginal swab and preserved slides were sent for forensic examination. Forensic report is Ex. Ka-16, according to which no sperm or semen was detected on vaginal smear slide, however, sperm and human semen were detected on vaginal swab.

6. The inquest report is Ex.Ka-4 and site plan is Ex.Ka-12.

7. The police conducted the investigation and submitted a charge sheet against the appellant Nirmal Kumar, in Case Crime No.768 of 2010, under Sections 302, 376 and 506 IPC, Police Station Mawai, District Faizabad.

8. The case was committed by the Chief Judicial Magistrate, Faizabad to the Sessions Court, Faizabad on 04.02.2011.

9. Charges were framed against the appellant Nirmal Kumar by the Sessions Court on 13.04.2011 for the offence under Sections 376, 506 and 302 IPC, which are as under :-

“मैं ब्रह्मदेव मिश्र, अपर सत्र न्यायाधीश, न्यायालय सं० 1, फैजाबाद आप अभियुक्त निर्मल कुमार पर निम्नलिखित आरोप लगाता हूँ-

प्रथम: यह कि दिनांक-20.09.2010 को समय 12.00 बजे दिन वहद स्थान ग्राम नरौली, थाना- मवई, जिला फैजाबाद में आपने वादी मुकदमा राम सजीवन की नाबालिग पुत्री xxx उम्र 14 वर्ष के साथ उसकी इच्छा के विरुद्ध जबरदस्ती उसके साथ बलात्कार किया। इस प्रकार आपका उक्त कृत्य भा०दं०सं० की धारा 376 के अन्तर्गत दण्डनीय अपराध है, जो इस न्यायालय के प्रसंज्ञान में है।

द्वितीय: यह कि उपरोक्त दिनांक, समय व स्थान पर आपने वादी मुकदमा की पुत्री को जान से मारने की धमकी देकर आपराधिक अभित्रास कारित किया। इस प्रकार आपका उक्त कृत्य भा०दं०सं० की धारा- 506 के अन्तर्गत दण्डनीय अपराध है, जो इस न्यायालय के प्रसंज्ञान में है।

अंतिम: यह कि दिनांक- 23.09.2010 को समय शाम लगभग 4.00 बजे के पूर्व किसी समय वहद स्थान ग्राम नरौली, थाना- मवई, जिला- फैजाबाद में जब वादी मुकदमा राम सजीवन रुदौली तहसील गया था और तहसील से लगभग शाम 4.00 बजे वापस आया इस बीच आपने वादी मुकदमा की नाबालिग पुत्री xxx की मृत्यु कारित कर दिया। इस प्रकार आपका उक्त कृत्य भा०दं० सं० की धारा 302 के अन्तर्गत दण्डनीय अपराध है, जो इस न्यायालय के प्रसंज्ञान में है।

एतद्वारा निर्देशित किया जाता है कि उपरोक्त आरोपों के अन्तर्गत आपका विचारण इस न्यायालय द्वारा किया जाये।”

10. The accused Nirmal Kumar denied the charges, therefore, he was put to trial.

11. The prosecution examined as many as eight witnesses, namely, (P.W.1)- Ram Sajeevan, informant and father of the deceased/ victim, (P.W.2)- Sumirata sister of the deceased/ victim, (P.W.3)- Ramawati resident of the same village, (P.W.4)- Smt. Nirmala another resident of the same village, (P.W.5)- Dr. R. Dwivedi, the autopsy surgeon, (P.W.6)- Bacchu Lal witness of the inquest, (P.W.7)- S.I. Ramanand Yadav the then Constable posted at Police Station Mawai and (P.W.8)- Ashok Kumar Saroj the then Station House Officer, Police Station Mawai and Investigating Officer of the case. The Sub Inspector under training Vinay Kumar Singh was examined as Court Witness that is C.W.1.

12. The appellant did not lead any evidence in defence.

13. Case of the defence was one of denial and false implication on account of enmity with the villagers.

14. The trial court on a consideration of evidence before it acquitted the appellant of the charge under Sections 302

and 506 IPC but convicted him for the offence punishable under Section 376 IPC. He was sentenced accordingly for rigorous life imprisonment with a fine of Rs.50,000/-.

15. There is no direct evidence to implicate the appellant Nirmal Kumar for the offence punishable under Section 376 IPC. The statement of the victim was not recorded either before the police or the Magistrate prior to her death.

16. Though the incident of rape is alleged to have taken place on 20.09.2010, the FIR was lodged on 23.09.2010, after the father of the deceased returned home on coming to know about the incident.

17. There is no direct evidence of anybody having seen the appellant enticing the victim away to his house and committing rape.

18. The appellant Nirmal Kumar has a criminal history of about seven cases, but, that by itself cannot be proof of commission of offence.

19. As per the viscera report also, cause of death could not be ascertained.

20. As regards the Forensic Report no doubt human semen was found on vaginal smear slide but no examination was undertaken to prove that it was that of the appellant Nirmal Kumar. This is a serious lapse on the part of investigation. The Forensic Report (Ex.Ka-16), therefore, may be evidence of sexual contact with the victim but not by itself of the charge that the appellant Nirmal Kumar committed any rape upon her.

21. The girl is said to be mentally challenged, aged about 14 years.

22. P.W.1- Ram Sajeevan, father of the victim, has deposed in his examination-in-chief that he returned to his house in the evening of 22.09.2010 when his daughter, who was crying, told him that the appellant Nirmal Kumar had enticed her away to his house and raped her. She had informed him that the incident was of Monday at 12.00 in the day. Thereafter, she became unwell. In the morning of 23.09.2010, he had gone to the Tehsil to get the report written and lodged, whereupon he was told that it will be lodged at Mawai. When he returned to his house in the evening, his daughter had died. He then got the

report written by Avadh Vihari, son of Vishram, resident of his village, who read it out to him, whereupon, he put his signature and gave it at the police station. He has proved the written tehrir submitted by him. In cross examination, he has admitted that he did not see the incident himself. His daughter (the victim) was mentally challenged since birth. She used to have fits, at times. When he returned to his house from work, the next day, he went to Rudauli to see the daughter of his brother-in-law who had been electrocuted. He got a report prepared at Tehsil Rudauli and took the same to the police station and put his signature thereon. When he returned (from Rudauli), his daughter had died. He has a daughter younger in age to the victim. Nobody had seen Nirmal Kumar committing rape upon his daughter.

23. P.W.2- Sumirata, the sister of the victim, has deposed in her examination-in-chief that her sister was mentally challenged. She was never taken to the fields to work. Her father (P.W.1) had gone to village Johlapur for work. She and her mother had gone to the fields. Her sister was alone at the house. The appellant Nirmal Kumar enticed her away to his house at about 12.00 in the day and raped

her. When she (P.W.2) and her mother returned, then her sister told her about it. Her father returned to the house after being informed. Her sister had told her father also about the rape by the appellant- Nirmal Kumar, three-four days earlier. She had told this in her presence and that of her mother. Her sister became unwell from the date of the incident. Her father had gone to Rudauli to lodge the report and by the time he had returned in the evening, her sister had died. Thereafter, her father went to police station Mawai to lodge the report. Her sister had died as a consequence of rape.

In cross examination she reiterated the fact that her sister was mentally challenged. Her father (P.W.1) was not in the house on the date of incident and had gone to her maternal grandmother's place for constructing a house. He returned three days after the incident. He had gone to lodge the report at the police station and by the time he returned her sister had died. On the date of the incident, she and her mother had gone to work in the fields of the MLA and were not at home. Her sister used to have fits. She (P.W.2) had not seen the incident. The appellant's house was behind her house. He (appellant Nirmal

Kumar) did not sell one of his rooms to her family but sold it to Parsu. All the villagers including the appellant belonged to the Paasi caste. Her sister was mentally challenged. The appellant's house and the house of the victim are situated just in front of each other.

24. As P.W.2 is not an eye-witness, therefore, obviously she has not seen the appellant enticing the victim away to his house and raping her and though as per P.W.2 the victim had informed her and her mother about the rape by Nirmal Kumar, however, the mother has not been examined.

25. P.W.3- Ramawati, has deposed in her examination-in-chief that the victim was mentally challenged. A day prior to the death of the victim, she along with Gulzara and Nirmala (P.W.4) were going towards the canal for cutting grass and had passed near the 'sehen' of P.W.1 (Ram Sajeevan/ father of the victim). The victim was lying in front of her house. Gulzara asked her whether she had eaten anything, whereupon the victim responded that she was unwell. On being asked by Gulzara, she further stated that Nirmal Kumar (appellant) had raped her three-four

days ago since then she was unwell. She had started crying. All of us went away to cut grass. She (P.W.3) returned in the evening and went to her home. The victim died the next day. She did not remember when the Daroga had taken her statement nor as to the number of days after the incident when the statement was recorded. In cross examination, she was not able to tell the name of the wife of Ram Sajeevan (P.W.1/ father of the victim). She had talked to Ram Sajeevan (P.W.1) in respect of the incident but was unable to tell the date and time of the incident. She had come to depose with P.W.1 (Ram Sajeevan) and P.W.4. (Smt. Nirmala). Ram Sajeevan (P.W.1) had asked her to depose, that is why she had come. She denied that the victim used to have fits but reiterated that she was mentally challenged. She reiterated her statement in examination-in-chief about the victim having told her about rape while she was going to cut grass along with others, though she had not indicated the time of the incident. She was not aware about the time of rape, whether it was committed in the morning or afternoon or evening or night. She stated that she now remembers that the Daroga had recorded her statement.

26. P.W.4- Smt. Nirmala, is also a resident of the same village. Her statement was recorded by the Daroga three months after the incident, which itself creates a serious question mark on its reliability, nevertheless, in her examination-in-chief, she has stated that she was going towards the canal to cut grass along with Gulzara and Ramawati (P.W.3) and passed near the 'sehen' of Ram Sajeevan (P.W.1) where the victim was lying in front of her house on a cot. On being asked by Gulzara, the victim stated that Nirmal Kumar (appellant) had raped her that is why she was unwell. Her statement was heard by Ramawati (P.W.3) and Gulzara. They did not pay much attention to it at that time and went away to cut grass. She came to know later that Nirmal Kumar (appellant) had asked the victim to fetch '*bidi*' for him from a shop but she did not go, that is why he enticed her away to his house and raped her. In her cross examination she has stated that she had come to depose along with Ram Sajeevan (P.W.1) and Smt. Nirmala (P.W.3). She has further stated that apart from Gulzara, Ramawati (P.W.3) and she (P.W.4) had also asked the victim whereupon she stated that she had been raped. She has stated that the

victim had informed them that rape had been committed at 10/11 in the day.

27. As mentioned, statement of P.W.2 (Smt. Nirmala) was recorded three months after the incident, moreover she has not seen the incident herself. The statement of victim was never recorded, as already mentioned earlier. Gulzara, the other witness, was not examined by the prosecution. It is pertinent to mention that the factum of victim having told anything about rape by the appellant-Nirmal Kumar, to Ramawati (P.W.3), Smt. Nirmala (P.W.4) or Gulzara prior to her death does not find mention in the FIR lodged by Ram Sajeevan (P.W.1.).

28. P.W.5- Dr. R. Dwivedi, the Autopsy Surgeon, has reiterated in his examination-in-chief, the recital in the post mortem report, that no injury on private part of deceased was seen though white discharge was visible, regarding which, swabs and slides were prepared. It is not out of place to mention that post mortem took place on 24.09.2010 whereas incident of rape is alleged to have taken place on 20.09.2010. In cross examination, he has reiterated that cause of death could not be ascertained,

therefore, viscera was preserved. According to him, time of death was one and a half days prior to the post mortem. In cross examination, he has stated that if sexual intercourse takes place with a young girl resulting in bleeding from the vagina, death could be caused. It is not as if such death could be caused within two to four hours, it could be caused within 24 to 48 hours.

29. At this stage, it is not out of place to mention that there is no medical evidence nor any statement of the P.W.5 to the effect that any bleeding was detected from the vagina of the victim. The post mortem itself took place almost four days after the incident. In cross examination, P.W.5 (Dr. R. Dwivedi) has stated that no external injury was found on the body of the deceased and that the time of the death was one and a half days prior to the post mortem.

30. In view of the above, while there is evidence to establish sexual intercourse with the victim, who was a minor and mentally challenged, there is no medical evidence to prove that the appellant Nirmal Kumar committed rape upon her.

31. P.W.6- Bacchu Lal is a witness of inquest, therefore, his testimony is not of much relevance.

32. P.W.7- Ramanand Yadav is the then Head Constable, who had lodged the FIR. In cross examination, he has stated that the informant/ Ram Sajeevan (P.W.1) had not come to the police station with the scribe of the tehrir to the police station. He had come alone.

33. P.W.8- Ashok Kumar Saroj is the Investigating Officer.

34. On a consideration of evidence on record, learned trial court did not find charges under Sections 302 and 506 IPC to have been proved by the prosecution against the appellant Nirmal Kumar (appellant) and accordingly acquitted him of the said charges.

35. While analyzing the evidence in context of charge under Sections 302, 506 IPC, the trial court considered the testimonies of P.W.1, P.W.2, P.W.3 and P.W.4 including their statements that the victim had told them, especially P.W.3 (Ramawati) and P.W.4 (Smt. Nirmala), that Nirmal Kumar (appellant) had raped her and also the

testimony of P.W.2 (Sumirata) that on account of rape by Nirmal Kumar (appellant) the victim died. The trial court has noticed that the P.W.2 (Sumirata) had not mentioned the time when she and her mother returned from the fields and the time when her sister (the victim) had told her about the rape. Likewise, P.W.1 (Ram Sajeewan) had mentioned that his daughter (the victim) told him about the incident after two days of the incident when he returned. The trial court in this context considered Section 6 of the Indian Evidence Act, 1872 as also certain rulings relied upon, but opined that the victim had not given any statement about the incident in near proximity of time, *vis-a-vis* the incident, therefore, it has not found any application of Section 6 of the Indian Evidence Act, 1872 nor the rulings relied upon.

36. The trial court has opined that the incident took place on 20.09.2010 whereas death took place on 23.09.2010, that is after three days, therefore, it cannot be said that death had been caused due to excessive bleeding consequent to rape. It has also considered the viscera report, according to which, no chemical poison was found in the body. The trial court has categorically recorded that

cause of death could not be proved by the prosecution. It has also noticed that if for three days excessive bleeding was taking place consequent to rape then the victim would have been taken for treatment but there is no evidence of her treatment during this period nor is there any evidence of death threat having been extended by Nirmal Kumar (appellant) to the victim, accordingly, charges under Sections 302, 506 IPC have not been found.

37. However, the trial court has found the charge under Section 376 IPC to be proved. In this context, it has considered the forensic report. We have already mentioned earlier that the forensic report is only evidence of the fact that human semen was found on the vaginal smear slide, which is proof of sexual intercourse and in the absence of any external injury to the body of the victim or internal injury to the private part of the victim, rape *per se* may not be proved, but, considering the fact that the victim was a minor and her consent, if any, was meaningless, therefore, in that sense it could be said that she was raped, but, the forensic report is no evidence of fact that the appellant Nirmal Kumar (appellant) raped her, as, no further medical examination etc. was

undertaken to prove that human semen found on vaginal smear slide was that of Nirmal Kumar (appellant). Therefore, the trial court has omitted this relevant aspect while examining evidence in the context of offence punishable under Section 376 IPC.

38. The trial court has believed the statement made by the victim to P.W.2 (Sumirata), P.W.3 (Ramawati) and P.W.4 (Smt. Nirmala) as being corroborative evidence without indicating as to whether at all such statements claimed by P.W.2 (Sumirata), P.W.3 (Ramawati) and P.W.4 (Smt. Nirmala) as having been given by the victim, amounted to admissible and relevant evidence on which conviction could be based in the facts and circumstances of the case. Secondly, it has not mentioned as to what was being corroborated by such statements because the forensic report itself is no evidence to prove the charge of rape under Section 376 IPC against the appellant Nirmal Kumar, as already discussed. In the context of charge under Section 302 IPC, the statements have not found favour with the trial court insofar as applicability of Section 6 of the Indian Evidence Act, 1872 is concerned, rightly so, considering the time lapse between the

incident, the statements and the absence of satisfaction of other ingredients of Section 6 of the Indian Evidence Act, 1872.

39. During the course of argument Shri Vimal Kumar Srivastava, learned Additional Advocate General fairly submitted that Section 8 of the Indian Evidence Act, 1872 was not attracted at all nor do we find it to be so nor has the trial court relied upon it.

40. Shri Vimal Kumar Srivastava, learned Additional Advocate General relied upon Section 32(1) of the Indian Evidence Act, 1872 and the decisions reported in **State of Maharashtra vs. Bandu alias Daulat** reported in **2018 (11) SCC 163**, **Rattan Singh vs. State of Himachal Pradesh** reported in **1997 (4) SCC 161**, **Shyam Singh Hada and ors. vs. State** reported in **RLW 2003 (3) Rajasthan 1918** and **Pakala Narayana Swami vs. Emperor** reported in **(1939) 41 BOMLR 428** to contend that merely because death did not take place or the charge of death/ murder was not proved would not take away from the dying declaration of the victim and Section 32(1) of the Indian Evidence Act, 1872 would be attracted. We

are unable to accept this submission. As is evident from Section 32 of the Indian Evidence Act, 1872 statements, written or verbal, or relevant facts, made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the eight categories of cases as mentioned in Sub Section 1 to 8. The case at hand does not fall in any of the eight categories. Shri Srivastava laid great emphasis on the second part of Section 32(1) of the Indian Evidence Act, 1872. The circumstances of the transactions which resulted in death are relevant in cases where the cause of that person's death is in question. The second part of sub section 1 of Section 32 of the Indian Evidence Act, 1872 on which reliance has been placed by Shri Srivastava has no application to the facts of this case as it merely states that such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be

the nature of the proceeding in which the cause of his death comes into question.

41. Such statements as are referred in Section 32(1) of the Indian Evidence Act, 1872 are relevant in cases in which the cause of a person's death is in question. In this case the trial court has categorically held that there was no evidence led by prosecution to prove that the death of the victim or her murder was a consequence of the rape committed by the appellant Nirmal Kumar.

42. The submission of Shri Vimal Kumar Srivastava, learned Additional Advocate General that even if death or murder was not proved statement made by the victim was relevant Section 32 of the Indian Evidence Act, 1872 for establishing rape, is not acceptable. He could not point out any authority where, in such circumstances, the claim of P.W.2 (Sumirata), P.W.3 (Ramawati) and P.W.4 (Smt. Nirmala), unless it was referable to Section 6 of the Indian Evidence Act, 1872, would be admissible and relevant for proving the charge as levelled against the appellant Nirmal Kumar. It would be too dangerous to do so when the victim's statement had not been recorded

before any police official/ magistrate, etc. who are competent in this regard.

43. We fail to understand as to how the statements of P.W.2 (Sumirata), P.W.3 (Ramawati) and P.W.4 (Smt. Nirmala) could be relevant for proving the charge of Section 376 IPC in the facts and evidence before us and how it could be treated as corroborative evidence when the forensic evidence merely points towards sexual intercourse or rape but not that the appellant Nirmal Kumar committed rape as there is no evidence to show that semen detected on the vaginal smear slide was that of appellant Nirmal Kumar which is a serious lapse on the part of investigation.

44. Considering the standard of proof in criminal matters one cannot, on mere hunch or suspicion, convict a person and hold him guilty of such offence.

45. We are of the considered opinion that trial court has committed an error in examining the evidence, its admissibility and relevance in the context of charge of rape under Section 376 IPC and convicting the appellant Nirmal Kumar based on the forensic report and the

statements of P.W.2 (Sumirata), P.W.3 (Ramawati) and P.W.4 (Smt. Nirmala), ignoring the fact that admittedly the statement of P.W.4 (Smt. Nirmala) was recorded by the police three months after the incident.

46. It is a case of circumstantial evidence but the chain of events is not complete nor does it point towards the guilt of the appellant Nirmal Kumar alone to the exclusion of any other possibility.

47. In view of the above discussion, it is not safe to convict the appellant Nirmal Kumar for the offence of rape. The judgment of the trial court dated 05.10.2018 being perverse is quashed.

48. The appeal is, accordingly, **allowed**.

49. The appellant Nirmal Kumar is acquitted of the charge of rape punishable under Section 376 IPC.

50. The appellant is directed to file a personal bond and two sureties in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of Criminal Procedure, 1973/ Section 481 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 within six weeks from date of his release.

51. The appellant Nirmal Kumar, who is in jail for the past eleven years, shall be released forthwith.

52. Let a copy of this judgment be sent to the concerned court for necessary action as also for service upon the appellant Nirmal Kumar, who is lodged in jail.

53. The original records shall be remitted back to the trial court for necessary action, if any.

(Brij Raj Singh, J.) (Rajan Roy, J.)

April 03rd, 2026

Amima