

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on : 26th November, 2014*
Pronounced on : 28th November, 2014

+ CRL.A. 848/2011

RAJESH SHARMA @ GULLU Appellant
Through : Ms. Saahila Lamba, Adv.

versus

STATE & ORS. Respondents
Through : Ms.Rajdipa Behura, APP for the
State/R-1.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. The Appellant Rajesh Sharma @ Gullu has preferred this appeal impugning the judgment dated 28th May, 2011 and order on sentence dated 1st June, 2011 whereby he had been convicted for committing an offence under Section 376 IPC and sentenced to undergo R.I. for seven years as well fine of Rs.1000/-, in default, S.I. for one month.
2. In brief, the prosecution case is that the PW1 complainant who happened to be mother of the Prosecutrix made a statement Ex.PW1/A to the effect that her daughter S(name withheld) aged 23 years had been missing from the house. 'S' was mentally challenged and not even in a position to speak clearly. She tried to search her in the adjoining houses. When she reached near General Store, she was

informed by the shopkeeper that her daughter had been sent with Rajesh Sharma @ Gullu to drop her at home. When she reached the house of Rajesh Sharma @ Gullu, through the hole in the door of the house, she found her daughter lying in nude condition and the Appellant was also lying on her in nude condition. She started knocking at the door. At that time, Rajesh Sharma @ Gullu picked his clothes and ran away from there. After some time, the door was opened by mother of Rajesh. She made her daughter wear her clothes and brought her back home. She noticed some sticky substance on her clothes and she made her to take bath and washed her clothes. In the evening, when her husband returned, he was apprised about the incident and he informed the PCR. She requested for legal action against the Appellant.

3. On the basis of statement Ex.PW1/A, FIR No.10/2010 was registered at P.S. Krishna Nagar. During investigation, the Prosecutrix as well as Appellant were subjected to medical examination. After completion of investigation, charge sheet was submitted.
4. After the charge for offence punishable under Section 376 IPC was framed, since the Appellant pleaded not guilty, the prosecution examined 13 witnesses to prove its case. In his statement under Section 313 CrPC the Appellant pleaded innocence and claimed to be falsely implicated due to dispute with PW1 over parking of his tempo. He also produced 3 witnesses in his defence.
5. After considering the rival contentions, learned Trial Judge was of the opinion that prosecution had been able to bring home the guilt against the Appellant accused beyond reasonable doubt. Hence, after

convicting him for committing rape on the Prosecutrix sentenced in the manner stated above.

6. When the appeal came up for hearing, the Appellant, who appeared before the Court as production warrant was sent, submitted before the Court that he is challenging his conviction to the limited extent that even if the testimony of PW1 is believed, at the most it could be a case of outraging the modesty of a woman or attempt to commit rape. It has been submitted that after considering the MLC of the Prosecutrix as well the statement of the doctors who have examined her as well PW1, he may be convicted only for the offence which is proved against him and sentence may be modified accordingly.
7. On behalf of the State, Ms.Rajdipa Behura, APP submitted that mother of the Prosecutrix had seen the Appellant as well as the Prosecutrix in nude condition. She further submitted that when PW-1 was searching for her daughter, she saw through the hole in the door that the Appellant was lying on her daughter. She further submitted that as per PW1, since both of them were in nude condition at that time, the intention of the Appellant to commit rape on the victim was there and even slightest penetration is sufficient to convict him for committing the rape, hence the appeal may be dismissed.
8. I have considered the submissions made at Bar and carefully perused the record. The limited issue that requires to be considered now is whether on the basis of testimony of PW1 and the medical evidence, can it be termed to be the case of attempt to rape or Appellant has been rightly convicted for committing the rape under Section 376 IPC.

9. PW1 Smt. Sunita Jain is the mother of Prosecutrix. The complainant has stated that her daughter S aged 23 years is mentally challenged. On 23rd January, 2010 after taking bath when she (PW-1) came out, she found her daughter S missing. From the person running a General Store nearby, she came to know that he had sent her daughter with Gullu who also reside in the neighbourhood to drop her at their house. When she went to the house of Gullu (Appellant), it was locked from inside. Since the iron gate was like that of iron grill, it was possible to see to the other side clearly as there was also a gap of 6 inches between the wall and the gate. Through the hole, she saw her daughter S was lying on the floor without clothes and Gullu was lying over her who was also in nude condition. On seeing this, she started beating the door. Then Gullu got up and after picking up his clothes ran away. His mother came down and opened the door and thereafter she brought her daughter back in the house. In the evening, when her husband came, she narrated the incident to him and police was called and complaint was made. In her cross examination, PW1 stated that she had seen the accused doing sexual intercourse with S and immediately she raised alarm but no-one heard or came at the spot. She has further stated that mother of the accused before opening the door put clothes on S which she could see from the door.
10. PW2 Shri Arvind Jain, father of the Prosecutrix is a witness to the fact that on being told about the incident, she informed the police. Police took the accused and his daughter for medical examination.

- 11.PW4 Alok Kumar was running the General Store. He had deposed that he had seen S going with Gullu and the fact that Gullu was also known to PW4.
- 12.PW5 Dr.Poornima Singh, Senior Resident, SDN Hospital has examined the Prosecutrix. She has stated that on medical examination, she found the Prosecutrix to be mentally challenged and unable to speak. On local examination, hymen was found intact but redness was seen in the medical side of both the thighs. In cross examination, she has stated that patient was passing urine, her under garments were smelling urine and there was possibility of redness in her thighs due to itching. She also stated that the history of sexual assault was given by mother of Prosecutrix.
- 13.From the statement of PW1, who is mother of Prosecutrix as well PW4 Alok Kumar, it is established beyond any doubt that the Prosecutrix who is mentally challenged and not capable to speak, was seen with the Appellant on that date.
- 14.The only question that remains to be considered is whether it is a case of attempt to commit rape on her or rape was committed. In this regard, though the statement made by mother of the Prosecutrix is to the effect that she had seen the Appellant committing sexual intercourse with her daughter but medical report proves otherwise. Had it been a case of penetration, there would have been some medical evidence to establish that fact. The statement made by the doctor PW5 Dr.Poornima Singh to the effect that hymen was intact and redness between thighs could be due to itching as Prosecutrix was passing urine rules out the possibility of rape on the Prosecutrix.

However, the fact remains that through the hole in the gate, the complainant had seen her daughter lying in nude condition as well as the Appellant lying on her in nude condition. It was at that stage that PW1, the complainant started knocking the door and the Appellant had to run away from there after picking his clothes. It may be noted here that had the Appellant committed rape on the Prosecutrix, there was possibility of hymen being ruptured or some redness/swelling on the private part of the Prosecutrix due to forcible act of sexual assault by the Appellant on the Prosecutrix. Although PW-1 has stated about some sticky substance on the clothes of her daughter which might be due to ejaculation.

15. In what circumstances a person can be convicted for attempt to commit rape were considered in detail in the case of ***Koppula Venkat Rao vs. State of Andhra Pradesh AIR 2004 SC 1874***. It was observed as under :

'8. The plea relating to applicability of Section 376 read with Section 511, IPC needs careful consideration. In every crime, there is first, intention to commit, secondly, preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable, by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt, must be united to Injury in order to justify punishment. As the injury is not as great as if

the act had been committed, only half the punishment is awarded.

9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary Intention, he commences his attempt to commit the offence. The word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it: and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress, has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing, line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence,

unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

11. In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the Prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

12. 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. Definition of "rape" as contained in Section 375 IPC refers to "sexual intercourse" and the Explanation appended to the Section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection. In the instant case that connection has not been established. Courts below were not correct in their view.'

16. While examining the facts of the instant case on the legal proposition laid down in **Koppula Venkat Rao vs. State of Andhra Pradesh**

(Supra), I am of the considered view that it is a case where there was no penetration but only an attempt which could not succeed because of arrival of mother of the Prosecutrix to the house of the Appellant and Appellant panicked on being seen by the mother of the Prosecutrix in that condition. Thus, I am of the considered view that it is a case where the conviction has to be altered from that of under Section 376 IPC to Section 376 read with Section 511 IPC.

17.Nominal roll of the Appellant dated 11.11.2014 is placed on record, as per which, out of the total sentence of 7 years R.I., he has already undergone sentence of 04 years, 01 months and 07 days. He has also earned remission of 11 months and 14 days.

18.Accordingly, while modifying the conviction of the Appellant to that under Section 376 read with Section 511 IPC in the above case, while maintaining the sentence of fine of Rs.1,000/-, the substantive sentenced awarded to the Appellant is reduced to the period of four years.

19.The Appeal stands partly allowed of in the above terms.

20.Trial Court record be sent back along with a copy of this order.

21.The Appellant be informed about the above order through the concerned Jail Superintendent.

22.A copy of this order be also sent to the Jail Superintendent concerned with direction to release the Appellant, if not wanted in any other case.

PRATIBHA RANI, J

NOVEMBER 28, 2014

'ks'