

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.46176 of 2012

Arising Out of PS.Case No. -219 Year- 2010 Thana -null District- DARBHANGA

Kamlesh Chaudhary, S/o Ramakant Chaudhary, R/o Village - Sahasram, Police
Station - Biraul, District – Darbhanga Petitioner

Versus

1. The State of Bihar

2. Babita Devi, W/o Ajay Poddar, R/o Village- Salamgarh, P.S. -
Kusheshwarsthan, District - Darbhanga

..... Opposite Parties

Appearance :

For the Petitioner/s : Mr. Rana Vikram Singh, Advocate

For the Opposite Party/s : Mr. J. N. Thakur, APP

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 11-05-2015

The present application under Section 482 of the Code of Criminal Procedure has been filed for quashing the order dated 13.09.2005 passed by the learned Additional Sessions Judge, Benipur in Sessions Trial No. 265 of 2011 arising out of K. Sthan P.S. Case No. 219 of 2010 whereby the learned Additional Sessions Judge, Benipur has dismissed the application of the petitioner filed under Section 227 and 228(1)(a) of the Code of Criminal Procedure (hereinafter referred to as “the Code”) for discharging him from the offence punishable under Section 376/511 of the Indian Penal Code

in view of the allegations made in the first information report and the evidence collected in course of investigation.

2. Heard learned counsel for the petitioner and learned Additional Public Prosecutor for the State.

3. The prosecution case in brief is that the informant, who was engaged in pulse polio programme came to Primary Health Centre Kusheshwar Sthan on 11.09.2010 for receiving her remuneration for work already done. She was asked to take the same from one Kamlesh Chaudhary, the data operator (petitioner). After some time, Kamlesh Chaudhary started talking about her family and, thereafter, caught hold of her and tried to take her towards bathroom. The informant sensing ill-intention of Kamlesh Chaudhary slapped him, whereupon he apologized and fled away.

4. It would appear from the record that on completion of investigation, the police submitted charge sheet under Section 376/511 of the Indian Penal Code against the petitioner and on receipt of the police report the learned Magistrate took cognizance of the said offence and after complying with the mandatory provisions prescribed under Section 207 of the Code committed the case to the Court of Sessions for trial. At the stage of framing of charge, the petitioner filed an application under Sections 227 and 228(1)(a) of the Code seeking discharge from the offence

punishable under Section 376/511 of the Indian Penal Code. The said application has been rejected by the Court below vide order dated 13.09.2012.

5. Being aggrieved by the aforementioned order dated 13.09.2012, the petitioner has filed the present application before this Court.

6. It has been contended that there is nothing in the first information report beyond the allegation of catching hold of the informant and trying to take her towards bathroom. Even in course of investigation, no other aggravating factor transpired. It has been submitted that even if the entire allegations made in the FIR are taken to be true, the ingredients of the offence punishable under Section 376 of the Indian Penal Code would be attracted.

7. Learned counsel for the State has contested the matter. He has submitted that there is no error in the impugned order dated 13.09.2012 passed by the learned Additional Sessions Judge, Benipur. According to him, the petitioner made an unsuccessful attempt to rape the informant of the case. Thus, after completion of investigation, the police had rightly submitted charge sheet under Section 376/511 of the Indian Penal Code and the court below has rightly rejected the application filed by the petitioner.

8. I have heard respective counsel for the parties and

perused the record.

9. I find that in view of allegation made in the first information report, which has duly been corroborated by the witnesses in course of investigation, the ingredients of the offence punishable under Section 376 of the Indian Penal Code are completely missing. The allegation in essence in the FIR is as follows:-

- (i) The informant alleged that petitioner tried to take her towards bathroom;
- (ii) The informant further alleged that sensing ill-intention of the petitioner she slapped him; and,
- (iii) After slapping, the petitioner apologized.

10. The allegation as discussed above would show that the informant did not allege rape. The petitioner did not commit any overt act amounting to rape as defined in Section 375 of the Indian Penal Code or did not even attempt to commit rape. The petitioner neither used any force nor gave any threat to the informant. The informant simply sensing the ill-will of the petitioner slapped him and after slapping, the petitioner did apologize.

11. The statutory provisions contained in Section 375 of the Indian Penal Code defines rape and illustrates the circumstances relating to rape and Section 376 of the Indian Penal

Code provides punishment for the same.

12. Section 511 makes punishable all attempts to commit offences punishable with imprisonment. In order to charge an accused for the offence punishable under Sections 376 with 511 of the Code, the Court has to be satisfied with the accused not only desired to gratify his passions but he intended to do so at all events.

13. The Indian Penal Code prescribes punishment for outraging modesty under Section 354 of the Indian Penal Code punishment has been prescribed for assault or criminal force to woman with intent to outrage her modesty it reads as under:-

“354. Assault or criminal force to woman with intent to outrage her modesty.- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

14. In **Koppula Venkat Rao vs. State of Andhra Pradesh [(2004) 3 SCC 602]**, the Supreme Court has considered and discussed the distinction between the intention to commit, preparation to commit and attempt to commit a crime in para 8 to 11 held 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, and 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.”

15. In a case in which accused is not determined or bent upon to have sexual intercourse in all events but uses criminal force to any woman with intention to outrage her modesty. A charge would be framed for the offence punishable under Section 354 of the Indian Penal Code and not under Section 376/511 of the Indian Penal Code.

16. In **Tarkeshwar Sahu vs. State of Bihar (Now Jharkhand) [(2006) 8 SCC 560]**, the Supreme Court has considered in detail as to whether an offence of a particular nature would amount to an attempt to commit rape or would come within the purview of Section 354 of the Indian Penal Code. In that case, the prosecutrix, aged about 12 years, came out of her house to answer call of nature. Accused forcibly took her to his ‘gumti’ for committing illicit sexual intercourse with her. The prosecutrix raised an alarm, and immediately thereafter, several persons including the father of the prosecutrix came from the adjoining houses and caught the accused before he could even make any attempt to ravish the prosecutrix. The trial Court convicted the accused under Sections 376/511 of the Indian Penal Code. The appeal preferred by the accused was dismissed by the High Court.

The judgment and order passed by the High Court was challenged in appeal before the Supreme Court. After hearing the parties, before reaching to any conclusion, the Supreme Court considered the facts of several cases decided earlier by different courts in paras 45 to 56, which are as under:-

“45. In *State of Kerala v. Hamsa* [(1988) 3 Crimes 161 (Ker)] it was stated as under: (Crimes p. 164, para 5)

“What the legislature had in mind when it used the word modesty in Sections 354 and 509 of the Penal Code was protection of an attribute which is peculiar to woman as a virtue which attaches to a female on account of her sex. Modesty is the attribute of female sex and she possesses it irrespective of her age. The two offences were created not only in the interest of the woman concerned, but in the interest of public morality as well. The question of infringing the modesty of a woman would of course depend upon the customs and habits of the people. Acts which are outrageous to morality would be outrageous to modesty of women. No particular yardstick of universal application can be made for measuring the amplitude of modesty of woman, as it may vary from country to country or society to society.”

46. A well known author Kenny in his book *Outlines of Criminal Law* (19th Edn., para 146, p. 203) has dealt with the aspect of indecent assault upon a female. The relevant passage reads as under:

“In England by the Sexual Offences Act, 1956, an indecent assault upon a female (of any age) is made a misdemeanour and on a charge for indecent assault upon a child or young person under the age of sixteen it is no defence that she (or he) consented to the act of indecency.”

47. In *State of Punjab v. Major Singh* [AIR 1967 SC 63] a three-Judge Bench of this Court considered the question—whether modesty of a female child of 7½ months can also be outraged. The majority view was in the affirmative. Bachawat, J. on behalf of majority,

opined as under:

“The offence punishable under Section 354 is an assault on or use of criminal force to a woman with the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define ‘modesty’. What then is a woman’s modesty?

... the essence of a woman’s modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under Section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as, for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act; nevertheless, the offender is punishable under the section.

A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby, seven-and-half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless from her very birth she possesses the modesty which is the attribute of her sex.”

48. In *Kanhu Charan Patra v. State of Orissa* [1996 Cri LJ 1151 (Ori)] the Orissa High Court stated as under:

“The accused entered the house and broke open the door which two girls of growing age had closed from inside and molested them but they could do nothing more as the girls made good their escape. On being prosecuted it was held that the act of the accused was of grave nature and they had committed the same in a daredevil manner. As such, their conviction under Sections 354/34 was held proper.”

49. The High Court of Delhi in *Jai Chand v. State* [1996 Cri LJ 2039 (Del)] observed as under:

“The accused in another case had forcibly laid

the prosecutrix on the bed and broken her pyjama's string but made no attempt to undress himself and when the prosecutrix pushed him away, he did not make efforts to grab her again. It was held that it was not an attempt to rape but only outraging of the modesty of a woman and conviction under Section 354 was proper."

50. In *Raja v. State of Rajasthan* [1998 Cri LJ 1608 (Raj)] it was stated as under:

"The accused took the minor to a solitary place but could not commit rape. The conviction of the accused was altered from Sections 376/511 to one under Section 354."

51. The Court in *State of Karnataka v. Khaleel* [2004 Cri LJ (NOC) 10 (Kant)] stated as follows: [Cri LJ (NOC) 10]

The parents reached the sugarcane field when accused was in process of attempting molestation and immediately he ran away from the place. There was no evidence in support of allegation of rape and accused was acquitted of charge under Section 376 but he was held liable for conviction under Sections 354/511 IPC.

52. The Court in *Nuna v. Emperor* [(1912) 13 Cri LJ 469] stated as follows: (Cri LJ p. 469)

"The accused took off a girl's clothes, threw her on to the ground and then sat down beside her. He said nothing to her nor did he do anything more to her: [It is held] that the accused committed an offence under Section 354 IPC and was not guilty of an attempt to commit rape."

53. The Court in *Bisheshwar Murmu v. State of Bihar* [2004 Cri LJ 326 (Jhar) stated as under:

"The evidence showed that the accused caught hold of the hand of the informant/victim and when one of the prosecution witnesses came there hearing alarm of the victim, offence under Sections 376/511 was not made out and conviction was converted into one under Section 354 for outraging the modesty of the victim."

54. The Court in *Keshab Padhan v. State of Orissa* [1976 Cutt LR (Cri) 236 stated as under:

"The test of outrage of modesty is whether a

reasonable man will think that the act of the offender was intended to or was known to be likely to outrage the modesty of the woman. In the instant case, the girl was 15 years of age and in the midnight while she was coming back with her mother the sudden appearance of the petitioner from a lane and dragging her towards that side sufficiently established the ingredients of Section 354.”

55. The Court in *Ram Mehar v. State of Haryana* [1998 Cri LJ 1999 (P & H)] stated as under:

“The accused caught hold of the prosecutrix, lifted her and then took her to a bajra field where he felled her down and tried to open her salwar but could not do so as in order to make the accused powerless the prosecutrix had injured him by giving a blow of the sickle. The accused failed to give his blood sample with the result it could be presumed that his innocence was doubtful. Ocular evidence of the prosecutrix was also corroborated by other evidence. It was held that conviction of the accused under Sections 354, 376/511 was proper but taking a lenient view only two years’ RI and a fine of Rs 1000 was imposed on him.”

56. In *Rameshwar v. State of Haryana* [1984 Cri LJ 786 (P & H)] the Court observed as follows: (Cri LJ p. 786)

“Whether a certain act amounts to an attempt to commit a particular offence is a question of fact, dependant on the nature of the offence and the steps necessary to take in order to commit it. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination. For an offence of an attempt to commit rape, the prosecution must establish that it has gone beyond the stage of preparation.”

17. After carefully analyzing the provisions pertaining to outrage the modesty to a woman/girl and considering the ambit and scope of Sections 376/511 and 354 of the Indian Penal Code in

Tarkeshwar Sahu (supra), the Court held the judgment passed by the High Court and the trial Court to be erroneous and unsustainable and, consequently, set aside the same. However, the Court convicted the accused for having committed offences under Sections 366 and 354 of the Indian Penal Code.

18. When I look back to the facts of the present case in the light of the law laid down by the Supreme Court, it would be evident that the petitioner is alleged to have tried to take the informant towards bathroom and when the informant protested and slapped him he immediately apologized. At best, it can be said that he tried to outrage the modesty of the informant. The petitioner had not crossed the stage of preparation to commit the offence. He was not determined to commit rape or to have sexual intercourse at all events because as soon as the informant protested and slapped him he apologized and ran away. He neither exposed the prosecutrix nor attempted to expose her. He did not even attempt to expose himself. Hence, it is not a case of an attempt to commit rape.

19. For the reasons recorded, hereinabove, the impugned order dated 13.09.2012 is set aside. The learned Additional Sessions Judge, Benipur, Darbhanga is directed to frame charge under Section 354 of the Indian Penal Code and remand the matter back to the Magistrate in terms of Section 228(1)(a) of the

Code for trial.

20. The application stands allowed to the extent indicated hereinabove.

(Ashwani Kumar Singh, J.)

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