

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

RESERVED ON : 19th FEBRUARY, 2015

DECIDED ON : 12th MAY, 2015

+ CRL.A. 300/2005

AKRAM

..... Appellant

Through : Mr.G.P.Thareja, Advocate.

versus

STATE (NCT) DELHI

..... Respondent

Through : Ms.Kusum Dhalla, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant – Akram impugns a judgment dated 01.04.2005 of learned Addl. Sessions Judge in Sessions Case No.5/04 arising out of FIR No.40/02 PS Seelampur by which he was held guilty for committing offences under Sections 376/511 IPC. By an order dated 02.04.2005, he was awarded RI for three and a half years with fine ₹5,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 15.02.2002 at around 04.00 p.m. on the first floor of Ishtyak's factory, gali No.22, Zafrabad, Delhi, the appellant attempted to commit rape upon 'X' (assumed name) aged about six years. The Investigating Officer lodged First Information Report after recording statement (Ex.PW-2/A) of victim's mother (Dr.Rehana) under Sections 354/506 IPC on 16.02.2002. 'X' was medically examined. Statements of the witnesses conversant with the facts were recorded. The accused was arrested and medically examined. Exhibits were sent to Forensic Science Laboratory for examination. After completion of investigation, a charge-sheet was filed against the accused for committing offences under Sections 376/511/506 IPC. The accused was charged under Sections 376/511 IPC by an order dated 09.04.2003 to which he pleaded not guilty and claimed trial. The prosecution examined eleven witnesses to substantiate its case. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file. Learned counsel for the appellant urged that the Trial

Court did not appreciate the evidence in its true and proper perspective and erred in relying upon the testimonies of interested witnesses without independent corroboration. He pointed out that 'X' did not suffer injuries on her body; her hymen was found intact. As per FSL report (Ex.PW-1/B) no semen was detected on her clothes. Delay of 28 hours in lodging the report has remained unexplained. The prosecution witnesses have given divergent and conflicting statements about the incident. No independent witness from the locality was associated at any stage of the investigation. Since the victim's parents were doctors by profession, the opinion about sexual assault reflected in the MLC was procured. Learned counsel for the appellant further urged that the appellant aged about 18 years was entitled to the benefit of release on probation which was denied to him. The appellant has already remained in custody for about 49 days; has three children to maintain them. Learned Addl. Public Prosecutor urged that no valid reasons exist to disbelieve the minor victim for sexual assault upon her.

4. On 15.02.2002 at about 03.00 p.m. after 'X' returned from her school, PW-2 (Rehana), her mother, as usual, asked her to serve pieces of carrots to goats tied on the roof of her house. 'X' went upstairs for serving the pieces of carrots to goats but did not return for a considerable

period. PW-2 (Rehana) suspecting something foul went upstairs and saw the appellant on the roof of his house which was adjacent to their roof. The appellant had dropped 'X' from the roof of his house to her roof. When the appellant was confronted, he did not stop and fled the spot. 'X' informed her mother that the accused had lifted her from the roof and had taken to the roof of his house where he removed her undergarment. She further revealed that the accused had also removed his undergarments and attempted to rape her. When PW-2 (Rehana) checked the garments which 'X' was wearing, she found semen stains on it. Immediately, she went to the house of the accused to lodge complaint but the accused's parents did not care. PW-2 (Rehana) informed her husband on phone at his clinic. Thereafter, the FIR was lodged. In the cross-examination, PW-2 (Rehana) disclosed that the height of wall in between the two houses was about 5 ft. Her husband returned to home at 05.30 p.m. When they were going to lodge report, the police officials met them in the gali and she made statement at her house. She admitted that on 15.02.2002, she did not visit the police station and hospital. She further admitted that her daughter did not sustain any injury. She denied that no such incident had taken place and the accused was falsely implicated in this case.

5. PW-3 (Jamir Ahmed), X's father has deposed on similar lines. He revealed that after getting information about the occurrence from his wife, they lodged the report with the police.

6. Crucial testimony to infer the appellant's guilt is that of PW-5 'X'. On the day of occurrence, she was aged about six years and was studying in a school. She deposed that after her return from school, she went upstairs to serve carrots to the goats as instructed by her mother. A boy who lived behind their house came upstairs and showed her photographs in his possession. After inquiring as to why she had come upstairs, he kept something on her eyes. The said boy then removed her trouser / pajama and put his penis on her vagina. In the meantime, her mother came upstairs. On seeing her mother, the boy ran away. 'X' identified the appellant to be the boy who was the author of the crime. She further revealed that the accused has taken her to his room before committing the said act. Her mother brought her downstairs and she apprised her as to what had occurred. In the cross-examination, she elaborated that the goats two in number were tied on the third floor and no one else was present there at that time; she used to go to the roof on earlier occasions also for that purpose. She revealed that accused Akram was known to her before the incident and used to visit their house when it was

under construction. She clarified that the room where the accused had taken her was adjoining to their roof and no one else was present there in that room. She categorically denied herself to be a tutored witness. She denied that the accused did not indulge in any sexual act.

7. Analysing the testimony of this minor child witness, it transpires that no material infirmities could be extracted to suspect her version. No ulterior motive was assigned to the child witness to make false allegations against the appellant. Nothing has emerged on record to show if prior to the incident there was any animosity or ill-will between the parties prompting X's parents to falsely rope in the accused for the heinous offence. In 313 Cr.P.C. statement, for the first time, the appellant alleged that due to a dispute between his father and X's father on account of mohalla samiti election, he was falsely dragged in this case. The appellant, however, did not produce any evidence to show if X's father nurtured any grievance against the appellant's father on that score. Nothing was elaborated as to when mohalla samiti election had taken place and what was the source of strained relations between the two families. When X's parents appeared in the witness box, no such suggestion was put to any of them. Moreover, for any such petty differences, X's educated parents who were in medical profession were

not imagined to level so serious allegations against the appellant to defame their own female child. Unless such an occurrence has really been occurred, parents of the little unmarried girl would be highly reluctant to make such allegations which have reflection on the chastity of the girl. The appellant did not examine his parents to substantiate his defence and to prove if any dispute had arisen any time over mohalla samiti election. Defence deserves outright rejection. No compelling reasons exist to disbelieve 'X' and to throw away the prosecution case overboard. Why a child of tender age would come forward in a court just to make a humiliating statement against her honour? She would not tarnish or damage her own reputation and image by volunteering to falsely claim that she had been defiled. Soon after the occurrence, 'X' narrated the incident to her mother who in turn called her husband. FIR was lodged soon thereafter and 'X' was medically examined. In her statement (Ex.PW-2/A) lodged on 16.02.2002, X's mother Dr.Rehana gave detailed account of the incident and named the appellant for committing the crime. In her Court statement as PW-2, she proved the version given to the police without major variation.

8. PW-3 (Dr.Anjali Chaudhary) medically examined 'X' aged around 6 years on 16.02.2002. She was brought there with the alleged

history of sexual assault on the previous day afternoon. On examination, she found her hymen intact; there was no abrasion / cut mark on her person; no bleeding and no injury on vagina; there was no redness and swelling, etc. She, however, in the MLC (Ex.PW-3/A) did not rule out allegation of forced attempt of sexual assault despite 'X' suffering no injury. 'X' in her Court statement did not allege if the appellant had inserted / penetrated male organ in her vagina. She was categorical and certain that after the appellant took her to his room, after putting off her clothes and his clothes, he put his male organ on her vagina. Apparently, there was no penetration and for that reason 'X' did not sustain any injury on her private part and did not bleed. Absence of injury on X's body is, thus, inconsequential and does not absolve the appellant of the crime committed by him.

9. After arrest, the appellant was taken for medical examination. PW-7 (Dr.Banarsi) who proved MLC (Ex.PW-7/A) prepared by Dr.Anand was not cross-examined. Contents of MLC (Ex.PW-7/A) reveal that there was evidence to prove that the patient could not perform normal sexual act. Perhaps it was the reason that after placing male organ on the vagina of the victim, the appellant could not complete the act further.

10. The appellant had taken the child 'X' aged around 6 years to a secluded place in a room without the consent or permission of her parents. He had no reason to take her to the room from the roof where she had gone to serve pieces of carrots to goats. Finding her alone on the roof, the appellant a young man took her in the room in his house after crossing a wall of 5 / 6 ft. existing between the two houses. After taking her inside the room, the appellant put off the clothes of the victim; he also put off his clothes. The appellant thereafter 'put' his male organ on the private part of the victim. It appears that due to his inability to perform sexual act, he could not proceed further to penetrate the male organ. He brought 'X' to drop her on her roof and at that moment was noticed by X's mother. The accused did not offer any explanation as to what had prompted him to take the child to his room where none else was present. Apparently, it was not a case where a preparation had been undergone by the appellant. Evidently, the appellant made an attempt to criminally assault the prosecutrix. It was not a case of mere indecent assault. In these circumstances, conviction under Section 376 IPC read with Section 511 IPC recorded by the Trial Court cannot be faulted. Every endeavour was made by the appellant to accomplish the object to commit rape, however, due to his inability to perform the sexual act, he could not succeed in his

attempt. Moreover, the act intended by the appellant was frustrated by the arrival of X's mother on the roof. Conduct of the accused was indicative of a determination to gratify his passion at all events.

11. Law regarding attempt to rape has been discussed elaborately in '*Koppula Venkat Rao vs. State of Andhra Pradesh*', AIR 2004 SC 1874.

The Supreme Court observed:-

“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.

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.

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.

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. It is true that there is delay in lodging the report with the police. The occurrence took place on 15.02.2002 and the FIR was lodged at 16.02.2002; ‘X’ was medically examined on 16.02.2002. PW-2 (Rehana) and PW-3 (Jamir Ahmed) both in their statements have deposed that the matter was reported to the police on the same day when they met them while patrolling in the gali. It appears that though the police was informed about the incident, the formal FIR came to be recorded on 16.02.2002. X’s parents had no reasons to delay the lodging of the FIR

when they had approached appellant's parent soon after the occurrence to lodge protest. Moreover, in view of overwhelming evidence of 'X' and her parents, mere delay in lodging the FIR is not fatal. It is true that as per FSL report (Ex.PW-1/B), no semen was detected on the clothes which 'X' was wearing. It makes no difference as 'X' did not allege / depose in her testimony that the appellant had discharged and semen stains had surfaced on her clothes.

13. I find no merit in the appellant's plea that the Trial Court committed error in not extending benefit of probation to him. The victim aged 6 years was sexually assaulted by the appellant by enticing her to his room. He exploited the innocence of the child. Due to incapability to perform sexual act, he could not penetrate and was unable to complete the offence of rape. Considering the gravity of the offence, the appellant was not entitled for the benefit of probation. In '*Tara Dutt vs. State*', 2009 SCC Online Del 1166, in CrI.R.P.No.321 of 2008, this Court observed :

"It was urged by learned counsel for the Petitioner that as on 27th March 2009 the Petitioner had already undergone a sentence of 1 year 2 months and 23 days and had earned a remission of 3 months and 15 days and therefore the sentence should be modified to the period already undergone. It is also sought to be urged on the basis of the judgments in Nil Kant Singh Munda

v. Satroghan Singh Munda 2008 CRI.L.J. 315, Shyamlal Babulal v. State of Madhya Pradesh 2008 CRI.L.J. (NOC) 235 (M.P.) and Rajbir v. State of Haryana AIR 1985 SC 1278 that the Petitioner should be given the benefit of the Probation of Offenders Act, 1958 (POA). Having carefully perused the aforementioned judgments, this Court finds that the facts in those cases are not even remotely comparable with the facts in hand. Giving the heinous nature of the present crime committed by a close relative with a helpless 7 years old girl, it is inconceivable how the case of the Petitioner can be even considered under the POA. On the contrary this Court considers that the inadequacy of the law has prevented the trial court from awarding a sentence greater than 2 years of imprisonment. ”

It is significant to note that in the above case, the author of the crime suffered conviction under Section 354 IPC only.

14. In ‘Ajahar Ali vs. State of West Bengal’, 2013 (10) 31, the Supreme Court declined to grant benefit of probation even under Section 354 IPC.

15. Minor inconsistencies, insignificant discrepancies and omissions highlighted by the appellant’s counsel do not go to the core of the prosecution case to discredit the otherwise cogent and reliable testimony of the child witness. ‘X’ stood the test of cross-examination and did not deviate from her version. She denied to have been tutored by her

parents to give a false statement. Conviction can be based on the sole testimony of the prosecutrix without any corroboration.

16. In the light of above discussion, the appeal lacks merit and is dismissed.

17. The appellant shall surrender before the Trial Court on 20th May, 2015 to serve out the remaining period of his substantive sentence awarded by the Trial Court. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

MAY 12, 2015 / tr