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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : OCTOBER 29, 2015

DECIDED ON : DECEMBER 10, 2015

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CRL.A. 635/2005

RAJU @ GAYUR

..... Appellant

Through : Mr.Brijesh Kumar Singh,
Advocate.

VERSUS

STATE

..... Respondent

Through : Mr.Amit Ahlawat, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant Raju @ Gayur impugns a judgment dated 08.04.2005 of learned Additional Sessions Judge in Sessions Case No.99/04 arising out of FIR No.326/04 registered at Police Station Badarpur by which he was held guilty for committing offence under Section 376 read with Section 511 IPC. By an order dated 21.04.2005, he was awarded Rigorous Imprisonment for three and half years with fine ₹500/-.

2. Briefly stated the prosecution case as reflected in the charge-sheet was that on 05.05.2004 at about 7:00 p.m. at House No.881, Gautam

Puri, Phase I, Badarpur, the appellant attempted to commit rape upon the prosecutrix 'X' (assumed name), aged around 13 years. The information about the incident was conveyed to the police at 10:55 p.m. and Daily Dairy (DD) No.27 A came into existence at Police Station Badarpur. The appellant was specifically named to have outraged the modesty of the prosecutrix 'X'. The investigation was assigned to SI Tika Ram who with Constable Anil went to the spot. The Investigating Officer after recording victim's statement (Ex.PW-2/A) lodged First Information Report. The prosecutrix was medically examined; she recorded her statement under Section 164 Cr.P.C. The accused was arrested and taken for medical examination. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellant for commission of offence under Section 376/511 IPC. The prosecution examined ten witnesses. In 313 Cr.P.C. statement, the appellant pleaded false implication. DW-1 (Shanno) and DW-2 (Munni) appeared in defence. On appreciation of the evidence and after considering the rival contentions of the parties, the Trial Court by the impugned judgment held the appellant guilty for the offence mentioned previously. Being aggrieved and dissatisfied, the instant appeal has been filed.

3. I have heard the learned counsel for the parties and have examined the record. Admitted position is that the victim's Mausi used to live on the ground floor of the premises in question. The appellant along with his wife and child lived on the first floor on rent. 'X' aged 13 years had come to her Mausi's house from her village two months before to take care she being on her family-way. Ossification report (Ex.PW-10/A) revealed that 'X' was more than ten years and less than 14.9 years on the date of her examination on 07.06.2004. Apparently, she was minor on the date of occurrence.

4. The incident took place at around 07.00 p.m. Police machinery was set in motion at around 10.55 p.m. vide DD No. 27A in which the appellant was named to be the perpetrator of the crime. Soon thereafter, the victim's statement (Ex.PW-2/A) was recorded and rukka (Ex.PW-9/A) was sent to lodge FIR at 1:30 a.m. on the night intervening 5/6.5.2004. 'X' was taken for medical examination at AIIMS where arrival time is recorded 00.21 hours. The alleged history mentioned therein records 'an attempt of rape by Raju'. Apparently, the appellant was named in the MLC (Ex.PW-6/A). In the complaint, 'X' gave detailed account as to how and under what circumstances, the appellant attempted to commit rape upon her when she had gone on the second floor of the

house to collect wheat spread over there. In her 164 Cr.P.C.statement, the victim reiterated her version and implicated the appellant to have attempted to commit rape upon her. In her Court statement, she proved the version given to the police and before the learned Magistrate without any major variations. She deposed that on the day of occurrence, her Mausi had spread 'wheat' on the appellant's roof to dry and had directed her to gather it. When she went upstairs to collect the wheat at around 07:00 p.m., the accused caught hold of her; dragged her inside the room; bolted it; closed her mouth; and, disrobed her. He also put off his clothes. Thereafter, he put his 'male organ' on her 'female organ'. At that time, on hearing sound of 'someone' coming, the accused fled the spot. She, after wearing her clothes, came down stairs weeping and informed her ordeal to her Mausi. In the cross-examination she denied if she used to play along with the appellant's children often on the roof. She denied that on that day the accused had slapped her for making a noise. She further denied if prior to the incident any quarrel had taken place with the accused and her family members. She denied if she had given false statement at her Mausi's behest.

5. Analysing the testimony of the little child, it transpires that no material infirmities or discrepancies could be extracted in the cross-

examination to suspect her version. No ulterior motive was assigned to the child witness to make false allegations against the appellant. Nothing has emerged to show if prior to the incident, there was any animosity or ill-will between the parties prompting X's relatives to falsely rope in the accused for the heinous offence. The appellant alleged false implication due to his slapping 'X' for making a noise disturbing his sleep. The defence deserves outright rejection. For trivial issue (if any) 'X' and her relatives were not imagined to level serious allegations against the appellant to defame an unmarried little child who was stranger to Delhi and had visited for short period to take care of her Mausi. Unless such an occurrence has really been occurred, parents or relatives of a 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 any child with whom the prosecutrix was playing at the relevant time disturbing his sleep. No witness from the locality was examined to substantiate his allegations. No compelling reasons exist to disbelieve X's testimony 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 Mausi. FIR was lodged promptly and 'X' was medically examined without delay. The appellant was named at the earliest in the initial information conveyed to the police vide DD No.27A recorded at around 10.55 pm. The prosecutrix is consistent throughout.

6. PW-3 (Paras), X's Mausi has corroborated her version in its entirety. After the occurrence when she saw the prosecutrix coming downstairs weeping, she enquired as to what had happened, only then she came to know about X's ordeal. She immediately made a telephone call at 100. Despite searching cross-examination, nothing material could be elicited to dent her version. She denied if 'X' was slapped by the accused for making a noise and on that account, he was falsely implicated in this case.

7. From the statement of the prosecutrix, it can be concluded that attempt was made by the appellant to ravish her. The accused had disrobed the prosecutrix inside his home when none else was present there. The accused had also put off his clothes and had put the male organ on X's female organ. Due to arrival of his wife at the spot, he could not complete the act of sexual assault. Since the attempt remained unsuccessful, there was no question of the prosecutrix to suffer injuries on

her private parts to give any benefit of doubt to the appellant as claimed. It was not a case of mere indecent assault. Every endeavour was made by the appellant to accomplish the object to commit rape, however, due to timely arrival of his wife, he could not succeed in his attempt. Conduct of the accused was indicative of a determination to gratify his passion at all events.

8. 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.”

9. Trial Court has discussed all the relevant contentions minutely in the impugned judgment and the findings based upon fair appraisal of the evidence need no intervention. Conviction under Section 376 read with Section 511 IPC is affirmed.

10. Regarding sentence, the appellant's counsel urged to take lenient view as the appellant who has no criminal antecedents has suffered custody for about two years and is to take care of his small children and aged parents. Considering the nature of crime, no mitigating circumstances exist to modify the sentence order. An innocent child aged around 13 years who was stranger to Delhi was sexually abused by the appellant aged around 27 years that time. Taking advantage of her innocence and tender age, every endeavour was made by the appellant to defile her. The appellant himself was a married man and had a child. He betrayed the trust of his neighbour.

11. The appeal lacks merits and is dismissed.

12. The appellant shall surrender before the Trial Court on 17.12.2015 to serve out the remaining period of 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

DECEMBER 10, 2015 / sa / tr