

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

RESERVED ON : January 15, 2015

DECIDED ON : January 22, 2015

+ CRL.A.915/2006

BUNTY @ BHARAT

..... Appellant

Through : Mr.M.L.Yadav, Advocate.

VERSUS

STATE OF DELHI

..... Respondent

Through : Mr.Navin K.Jha, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 20.09.2006 of learned Additional Sessions Judge in Sessions Case No.104/05 arising out of FIR 35/05 under Section 354/376/511 IPC registered at Police Station Hauz Qazi whereby the appellant Bunty @ Bharat was held guilty for committing offences under Section 354 and 376 read with Section 511 IPC. By an order dated 22.09.2006, the appellant was awarded RI for two years under Section 354 IPC and RI for five years with fine ₹2,000/-

under Section 376 read with Section 511 IPC. Both the sentences were to operate concurrently.

2. The prosecution case as reflected in the charge-sheet was that on 26.01.2005 at around 3:00 p.m., the appellant took the prosecutrix 'X' (assumed name) aged seven years to his house and sexually assaulted her there. FIR under Section 354 IPC was registered on the statement of victim's mother-Kamlesh. The prosecutrix was medically examined. Her statement was recorded under Section 164 Cr.P.C. The accused was arrested. Statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted in the court against the appellant for commission of the aforesaid offences. To establish its case, the prosecution examined fifteen witnesses in all. Statement of the accused under Section 313 Cr.P.C. was recorded in which he denied the allegations and pleaded false implication. He examined DW-1 (Shiv Dutt) in his defence. After appreciating the evidence and considering the rival contentions of the parties, the trial court by the impugned judgment convicted the appellant for the offences mentioned previously. Being aggrieved and dissatisfied, the appellant has preferred the appeal.

3. During the course of arguments, the learned counsel for the appellant restricted his arguments for conviction of the appellant under Sections 376/511 IPC. He urged that the ingredients of Section 376 read with Section 511 IPC are not attracted in the absence of any material giving definite indication of attempt to rape. The prosecution witnesses have narrated divergent and contradictory statements to prove its case and to bring it within four corners of the said offence.

4. Learned APP urged that every endeavour was made by the appellant to accomplish his object to commit rape, however, due to arrival of some one at the appropriate stage, he could not succeed in his attempt. The act intended by the appellant was frustrated only by extraneous circumstances. There are no sound reasons to disbelieve the prosecutrix and other material witnesses.

5. So far as offence under Section 354 IPC is concerned, the statement of the prosecutrix X, a child witness, is enough to establish appellant's guilt. She has categorically deposed that after taking her inside the room, the appellant not only undressed her but also undressed him. She even testified that 'wrong act' i.e. pressing the vagina was done by the appellant. The child witness had no ulterior motive to falsely implicate the accused.

6. Regarding attempt to rape, 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.”

7. On perusal of the record it reveals that various versions have emerged at different stages of the investigation/trial. The prosecutrix was taken by the appellant at around 03:00 p.m. to his room where the occurrence took place. After about ten minutes ‘X’ returned to her home on her own. No complaint/report was lodged with the police soon after PW-1 (Kamlesh) came to know about the alleged incident. Police machinery swung into action when statement of prosecutrix’s mother Kamlesh was recorded after a considerable delay of four hours at 07:00 p.m. In her statement (Ex.PW-1/A), Kamlesh disclosed that when ‘X’ returned at around 03:00 p.m., she apprised her that Bunty (the appellant) had done a ‘wrong act’. On hearing that she got perplexed. After getting the pant off, she checked if ‘X’ had sustained any injury on her body. No

such injury was noticed. 'X' did not feel pain. 'X' informed her that when she had gone while playing inside the house, the appellant after bolting the door from inside had embraced her. After opening the chain of her pants, he had pressed her private part. Thereafter she was sent back to her house with caution not to disclose it to anyone.

8. In the initial version given to the police at the first instance there is no mention if 'X' had returned to the house weeping or that Kamlesh had seen blood on the pants which she was wearing at that time. There is no indication if 'X' had disclosed to her mother that the appellant had undressed himself or had attempted in any manner to ravish her sexually. Again, there is no mention if arrival of any stranger prevented him from accomplishing the act. It is relevant to note that rukka sent at around 7:00 p.m. was for registration of FIR under Section 354 IPC only.

9. The prosecutrix 'X' was thereafter taken to Lok Nayak Hospital for medical examination where MLC (Ex.PW-4/A) was recorded at 08:30 p.m. in the presence of her mother Kamlesh. In the alleged history recorded by the doctor, an improved version was given by Kamlesh stating that there were certain blood stains on the trousers of the appellant Bunty. When she inquired from Bunty about the blood stains, he could not give any reply. The victim informed the doctor that after

locking the door from inside, the accused had opened his trousers zip. He had also opened her trouser's zip and thereafter did 'gandi baat'. She was unable to describe as to what was the 'wrong act' ('gandi baat'). Again, in the MLC (Ex.PW-4/A), there is no mention of any blood on the pants of the child after her return to the home after the incident was noticed. There is no reference if she had heard voice of anyone inside the room which prompted the accused to let her go. As per MLC, no internal or external visible injuries were found on the body of the victim. There were no marks of injury on vulva or thigh. Hymen appeared intact.

10. In her statement under Section 164 Cr.P.C. on 3rd February, 2005, the victim added that inside the room, the appellant had placed his hand over her mouth and had opened his chain with other hand. Thereafter, he opened her chain and made her to lie. The appellant did 'gandi baat' with his 'chain'. When he pressed her, she felt pain. On sensing someone coming from upstairs, he let her go. She further added that his pants had also got blood stains. Apparently, the victim has made vital improvements in her statement under Section 164 Cr.P.C. It is not explained as to how the blood occurred on the pants of the accused. There is no mention if any external act was done by the appellant in furtherance

of his intention to commit rape. Primarily the allegations are about molestation.

11. In her statement before the court as PW-3 the witness made further improvements stating that the appellant had enticed her on the allurement to give her something. She further deposed that after she entered the room, the accused closed it and told her to lie on the floor. He, thereafter, opened the chain of his pants and that of her pants and placed himself on her. When she tried to cry, the accused closed her mouth. On hearing the sound of someone coming, he got up and cautioned her not to tell about the incident or else he would kill her and her parents. She came out of the room. Her pants was having blood stains near the chain on the front side. Her mother inquired from her regarding the blood stains on her pant, she told that she did not know how her pants had got blood stains. She further deposed that the accused had pressed her vagina with his hand. She was not aware how the blood came. The prosecution has failed to reconcile the initial version given to the police and one deposed before the court. The improvements and contradictions have remained unexplained. PW-1 (Kamlesh) in her statement before the court deposed that when 'X' came weeping, on inquiry for the cause of her weeping, she told that Banti Chacha had done

‘wrong act’ with her. She had noticed blood on the pants which ‘X’ was wearing. Thereafter, she was taken to Police Station Hauz Qazi and her statement (Ex.PW-1/A) was recorded. Admittedly, when ‘X’ was taken to Police Station the pants which she was wearing was kept at the house and was not taken to the police station.

12. On scanning the testimonies of all the witnesses, it is unclear if pants which ‘X’ was wearing at the time of occurrence had any blood stains over it. During investigation, the accused was arrested and the pants which he was wearing on the day of incident having some blood stains was seized. The articles were sent to Forensic Science Laboratory and the reports (Ex.PW15/E and Ex.PW15/F) were collected. As per FSL reports, blood was detected on Ex.1 i.e. one pants (small) having dark brown stains on many places and Ex.2 i.e. one baby shirt having dark brown stains on front side. No blood was detected on Ex.4a [one pants (seems to be new)] and Ex.4b (one underwear). No semen or spermatozoa were detected on clothes of either of the victim or the accused. It could not be ascertained that human blood detected on Ex.P-1 and 2 was that of the appellant.

13. The conviction under Section 376/511 IPC is primarily based upon the report of Dr.K.Goel (PW-11) who medically examined the

appellant on 29.01.2005. As per his opinion (Ex.PW-11/A) in view of the injury observed over the frenum of the accused, the act of forcible sexual manipulation could not be ruled out. Injuries were about 3-4 days old. The findings of the trial court on this aspect cannot be sustained. The prosecutrix or her mother did not reveal if the accused had sustained any injuries during the incident over frenum. In fact, there is not an iota of evidence to infer if any forcible attempt was made with the male organ to commit the offence. The prosecutrix has failed even to utter a word if the male organ was placed over her private part to suffer injury. She has merely deposed that the 'chain' of the pants was opened and hand was used to press her vagina. The accused was arrested on the day of incident itself i.e.26.01.2005. It appears that before reporting the matter to the police, Kamlesh had confrontation with him when she inquired as to how the blood had appeared on his pants. Despite that, the appellant was not taken for medical examination that day. He was taken for medical examination on 29th January, 2005 i.e. after three days of the occurrence at 12:30 p.m. The doctor did not notice any injury on his body and referred him to Forensic expert for expert opinion. PW-11 (Dr.K.Goel) found that there was a small 0.5 c.m. superficial tear over frenum. The accused was admitted to bail on the same day i.e.26.01.2005. The application moved

before the Court of Sh.S.K.Gautam, M.M., on 29.01.2005 for permission to take him to hospital for medical examination, showed presence of the accused in the court from judicial custody in some other case. It is, however, not clear as to in which case the accused was in judicial custody and how he happened to appear on that day before the court. Minor injury after three days of the incident as depicted in MLC (Ex.PW-12/A) does not inspire confidence to infer that it was the result of any act during the incident.

14. Both the prosecutrix and the accused were inside the bolted room for sufficient duration. The accused had the ample opportunity to accomplish his object. The child aged seven years was not physically capable to prevent him from achieving the object. No cogent evidence has come on record that due to arrival of someone, the appellant panicked and could not succeed in his alleged attempt to gratify his passion. Despite having the opportunities, no overt act was done by the appellant towards the commission of the offence i.e. to ravish the child. There is no definite indication of attempt to rape the child. Mere intention with certain preparations by itself is not enough to constitute an offence under Section 511 IPC but the accused must have done certain acts in furtherance of such intention and preparation. She was permitted to go by

the appellant to her home. He did not abscond and was present at his house when confronted by her mother soon after the occurrence.

15. Considering the facts and circumstances of the case, I am of the view that the conviction of the appellant for the offence under Section 376 read with Section 511 IPC cannot be sustained and he deserves benefit of doubt. The prosecution has established commission of offence under Section 354 IPC for which the appellant has been sentenced to undergo RI for two years. Since the appellant has molested an innocent child in his room, he deserves no leniency. Conviction and sentence under Section 354 IPC are upheld.

16. In the light of the above discussion, appeal filed by the appellant is partly allowed. While setting aside the conviction under Section 376/511 IPC, the appellant stands convicted under Section 354 IPC. The appeal is disposed of accordingly.

17. As per nominal roll dated 22.05.2007, the appellant has already undergone two years, three months and twenty four days incarceration as on 21.05.2007. Apparently, he has served out the substantive sentence awarded under Section 354 IPC. He is not required to surrender. Copy of this order be sent to the concerned Jail

Superintendent for information and necessary action. Trial court record
be sent back along with a copy of this order.

(S.P.GARG)
JUDGE

JANUARY 22, 2015
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