

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

RESERVED ON : 19th MAY, 2015

DECIDED ON : 1st JULY, 2015

+ CRL.A.155/2015 & CRL.M.B. 256/2015

ASHOK KUMAR Appellant

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

versus

STATE (G.N.C.T. OF DELHI) Respondent

Through : Ms.Aasha Tiwari, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Present appeal is directed against a judgment dated 07.08.2014 of learned Addl. Sessions Judge in Sessions Case No. 28/13 arising out of FIR No. 374/12 PS North Rohini by which the appellant – Ashok Kumar was held guilty for committing offence under Section 376(2)(f) IPC read with Section 511 IPC. By an order dated 21.08.2014, he was sentenced to undergo RI for seven years with fine ₹ 5,000/-.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 23.10.2012 at about 02.00 p.m. at A- 68, Naharpur village, Sector – 7, Rohini, the appellant committed rape upon ‘X’ (assumed name) aged around 7 years. On getting information of a quarrel vide Daily Diary (DD) No.42A (Ex.PW-14/A) recorded at 8.24 hours on 23.10.2012 SI Sachin Kumar with Const. Surender Kumar went to the

spot. After recording statement (Ex.PW-3/A) of victim's grand-mother – Rajni Devi, the Investigating Officer lodged First Information Report. In her complaint, Rajni Devi gave vivid description of the incident and disclosed how and in what manner, the appellant was found attempting to commit rape upon her grand-daughter 'X'. 'X' was taken for medical examination, she recorded her statement under Section 164 Cr.P.C. On 24.10.2012, the appellant was arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. After completion of investigation, a charge-sheet was filed against the appellant – Ashok Kumar for commission of offence under Section 376 (2)(f) IPC read with Section 4 POCSO Act. The accused pleaded not guilty to the charges and claimed trial. The prosecution examined fifteen witnesses to substantiate its case. In 313 Cr.P.C. statement, the appellant – Ashok Kumar pleaded false implication and denied his involvement in the crime. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held the appellant guilty of commission of offence under Section 376 (2)(f) IPC read with Section 511 IPC only and acquitted him of other charges including the one under Section 4 of

POCSO Act. It is pertinent to note that the State did not challenge the said acquittal. 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 minutely. Admitted position is that 'X' was a child aged around 7 years on the day of incident. The appellant aged around 37 years lived in her neighbourhood.

4. Material testimony to infer the appellant's guilt is that of 'X'. In her 164 Cr.P.C. statement recorded on 15.01.2013 before learned Metropolitan Magistrate, she gave detailed account of the incident and disclosed as to how Ashok Kumar who lived in her neighbourhood took her in his room; bolted it from inside; switched 'off' the light and disrobed her. After putting off his clothes, he put his male organ into her female organ and committed 'wrong' act. Thereafter, her grand-mother arrived there and pushed the door. She slapped Ashok Kumar and brought her home. 'X' appeared as PW-4 to record her Court statement. Learned Presiding Officer put various questions to her to ascertain if she was a competent witness and was able to answer the questions. After recording her satisfaction that 'X' was capable to understand the questions and answer them reasonably, she was examined without administering oath. In

response to various questions 'X' categorically implicated the appellant – Ashok Kumar for the crime. She disclosed that on the day when her mother had left her and her sisters inside the house, the accused – Ashok Kumar came there. He sent her sister to a shop to bring 'Gutka'. On that day her sisters – Priyanka and Tania went to the shop and she was left there along with her younger sister. Thereafter, the accused took her to his room lifting her in his lap and made her lie down on a bed (Bistar par paad diya). Thereafter, the accused put off her clothes and also that of his clothes and inserted his male organ in her female organ. Her grand-mother who arrived at the spot on hearing her cries, slapped Ashok and she was brought home. She narrated the incident to her grand-mother. In the cross-examination, she denied to be a tutored witness. She fairly admitted that on one occasion, a quarrel had taken place with Ashok Kumar over throwing of garbage. She, however, declined that that was the reason to implicate him in the crime. She revealed that when her grand-mother had slapped Ashok Kumar, he was inside the room. He was taken away by the police on the same day when he was preparing food. She denied the suggestion that no such incident had occurred with her.

5. On scrutinising the testimony of the child witness, it appears that she has stood the test of cross-examination and no material

discrepancies / infirmities could be elicited in her cross-examination. She answered all the questions intelligently with clarity. Her entire statement reflects her sense of understanding and wisdom. The Trial Court made the atmosphere quite congenial while recording her statement. She was comfortable and even prepared a beautiful drawing (Annexure P1). It shows maturity and intelligence level of the child. There are no valid reasons to disbelieve her statement. Being a child, she was not concerned with any petty quarrel between her parents and the appellant. She was not imagined to implicate a neighbourer with whom she had no ill-will before the incident to level serious allegations of rape to have reflection on her own chastity. The incident was reported to the police promptly without any delay. There was least possibility of the prosecution witnesses to concoct a fictitious or fabricated story in such a short interval. X's ocular testimony is in consonance with medical evidence. She was taken to Dr. Baba Saheb Ambedkar Hospital, Rohini on 23.10.2012 at 10.40 p.m. The alleged history recorded therein stated that the patient was sexually molested by somebody that day at around 02.00 p.m. There were no fresh external injuries over the body. Hymen was found intact vide MLC Ex.PW-9/A.

6. PW-3 (Rajni Devi), X's maternal grand-mother aged about 55 years has corroborated her version in its entirety. She had arrived at the spot on hearing her cries inside the appellant's room and had seen both of them together. The appellant did not deny his presence along with 'X' inside his room. He failed to explain what had prompted him to take the child to his room without the consent and permission of her family members. PW-3 (Rajni Devi) disclosed that on hearing the cries, she went and peeped through a window inside the room. She saw that the accused lying on the prosecutrix was attempting to do 'something'. She gave two slaps to him. When her daughter-in-law returned, she disclosed the incident to her. Her version has remained unchallenged in cross-examination. She denied that X's parents were inimical towards the accused and they often used to quarrel over water, etc. Again, there are no sound reasons to disbelieve Rajni Devi who had named the appellant in her statement (Ex.PW-3/A) which formed the basis of registration of the instant FIR. Last seen evidence is a material incriminating circumstance to put an accusing finger against the appellant. PW-2 (Nirmala Devi), X's mother has deposed on similar lines. She denied false implication of the accused due to quarrel over throwing of garbage and shortage of water.

7. In 313 Cr.P.C. statement, the accused did not give plausible explanation to the incriminating circumstance proved against him. He merely pleaded that false implication was due to previous quarrels. 'X' and her parents were not expected to drag their minor child on account of any petty quarrel which might have occurred on some small issue among the neighbours. No serious quarrel had taken place aggravating the relations between the two. Unless such an occurrence had really taken place, parents of a little girl would be highly reluctant to make such serious allegations. The statement of the prosecutrix is consistent throughout and has been corroborated in its entirety by PW-2 (Nirmala Devi) and PW-3 (Rajni Devi) coupled with medical evidence.

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. In view of above, conviction for attempted rape can't be faulted. The impugned judgment is based upon fair appraisal of the evidence and needs no intervention. Prayer of the appellant's counsel to modify the sentence order being excessive and unreasonable is without substance. The victim was a child aged around 7 years. Timely arrival of X's grand-mother prevented commission of serious offence of rape. The appellant was fortunate not to be punished for stringent provisions under POCSO Act as it came into operation on 14.11.2012. The accused taking advantage of absence of her parents took 'X' to his room and attempted to ravish her. He deserves no leniency. Sentence order needs no modification except that default sentence for non-payment of fine ₹5,000/- shall be fifteen days instead of six months.

10. In the light of above discussion, the appeal stands disposed of in the above terms. Pending application also stands disposed of. The 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

JULY 01, 2015 / tr