

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 839 of 2005

1. Murli Dewangan, S/o Ramsewak Dewangan, aged about 30 years, R/o Baniapara, Dhamtari, P.S. & Dist. Dhamtari (C.G.)

---- Appellant

Versus

1. State Of Chhattisgarh, through District Magistrate Dhamtari, Dist. Dhamtari (C.G.)

---- Respondent

For Appellant

Ms. Fouzia Mirza, Advocate

For Respondent/State

Shri P. K. Bhaduri, Govt. Advocate

Hon'ble Shri Justice Prashant Kumar Mishra

Order On Board

09/02/2016

1. The appellant has called in question the impugned judgment of conviction and order of sentence dated 25.10.2005 passed by the Additional Session Judge, Dhamtari, in S.T. No.167/2005 convicting him for the offence punishable under Section 511/376 of the Indian Penal Code (for short 'the IPC') and sentenced him to undergo R.I. for 5 years and to pay a fine of Rs.100/-, in default of payment of fine to further undergo R.I. for one month.
2. Facts of the case, as emerging from the prosecution case, in brief, are that the prosecutrix was standing at the door of her house at about 9.00 pm on 11.11.2004. At that time, the

appellant came and said the prosecutrix that his aunt is calling her and her sister. The prosecutrix and her sister went to the house of the appellant, where the appellant asked them to sleep on the bed. The appellant, thereafter, entered the room, switched off the light and shut the door. He tried to sleep by the side of the prosecutrix and pull down her underwear, on which the prosecutrix raised alarm and she along with her sister got up from the bed; opened the door; and ran away from the place. The prosecutrix narrated the incidence to her mother whereupon they went to meet the father of the prosecutrix and they lodged the First Information Report (Ex. P/1) at 22.45 hours on the date of the incident itself. The prosecutrix was medically examined. After recording the statement of witnesses and completing other investigation, charge sheet was filed against the appellant for committing offence under Section 376 (2) (f) read with Section 511 of the IPC. The trial Court also framed charges under the said provisions.

3. In course of trial, prosecution examined the witnesses namely; prosecutrix (PW-1), Shiv (PW-2), Ku. Purnima Yadav (PW-3), Sato Bai (PW-4), Rupa (PW-5), Dr. Asha Tripathi (PW-6), Vasudev Boi (PW-7), Bhuvneshwar Yadav (PW-8), U. R. Diwan (PW-9), Dr. Y. K. Singh (PW-10), Urmila Jyotima Divakirti (PW-11) & Vasudev Boi (PW-12).
4. The appellant abjured the guilt and pleaded innocence. On the basis of material available on record, the trial Court has convicted

the appellant for commission of offence punishable under Section 511 of the IPC and sentenced him, as aforestated.

5. Assailing the impugned judgment, Ms. Fouzia Mirza, learned counsel appearing for the appellant, would submit that there is absolute lack of evidence to constitute an attempt to commit rape, therefore, the judgment deserves to be set aside. To buttress her contention, Ms. Fouzia Mirza placed reliance upon the decisions rendered by the Supreme Court in **Madan Lal v. State of Jammu and Kashmir**¹, **Aman Kumar and another v. State of Haryana**² and **Tarkeshwar Sahu v. State of Bihar (Now Jharkhand)**³.
6. Per contra, Shri P.K. Bhaduri, learned Government Advocate appearing for the State, would support the impugned judgment on the submission that the appellant having taken several steps in furtherance of execution of his plan to commit rape on the prosecutrix, it is a clear case of attempt to commit rape and the judgment does not call for any interference.
7. The law as to when a case would fall within the definition to commit crime or to say attempt to commit rape, is settled by the Supreme Court.
8. In **Koppula Venkat Rao v. State of A.P.**⁴, it has been held thus:-

1 AIR 1998 SC 386

2 (2004) 4 SCC 379

3 (2006) 8 SCC 560

4 (2004) 3 SCC 602

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.

9. In **Attorney General's Reference (No.1 of 1992)**⁵, Lord Taylor of Gosforth CJ, while presiding over the Court of Appeal, Criminal Revision, held thus:-

“In order to raise a prima facie case of attempted rape under s 1 (1)a of the Criminal Attempts Act 1981 it is not necessary for the prosecution to prove that the defendant had with the requisite intent necessarily gone as far as to attempt physical penetration of the victim's vagina. If there is evidence from which the intent can be inferred and there are proved acts which a jury could properly regard as being more than merely preparatory to the commission of rape and as showing that the defendant had embarked on committing the offence that is sufficient to raise a prima facie case of attempted rape.”

10. In the case at hand, when the prosecutrix appeared in the witness box, she would depose that the appellant asked her to lie on bed and, thereafter, he also laid on the bed and tried to remove her underwear. When the appellant proceeded to switch on the light, she raised alarm and ran away from the place. Thus,

5 [1993] 2 All ER 190

as per the version of the prosecutrix, the appellant did not undress himself nor he touched the private parts of the prosecutrix. The appellant did not proceed further to lay over the prosecutrix, whereas in the FIR she would state that the appellant laid over her. Not only there is dilution in the statement made in the FIR and in the case diary, the prosecutrix deposed in the Court as if she was all alone with the appellant at the time of incidence, whereas in the previous statement, she would state that she and her sister both had gone to the house of the appellant. In further examination, she has stated that the appellant was trying to remove her underwear, but did not proceed further meaning thereby that the appellant had not even removed her underwear, but only tried to do that. It is on this statement of her, the Court allowed the prosecution to ask leading questions. At this stage, the prosecutrix again stated that the appellant had not removed his own underwear or gamchha.

11. The evidence would clearly demonstrate that the appellant might have intentions to commit the offence and was initiating the preparations, but the same did not culminate into an attempt to commit rape. As the evidence suggests, even the prosecutrix had not undressed. It is not a case where the preparation was so advanced that it got converted into an attempt but falling short of actual consummation.

12. In the considered opinion of this Court, it is not a case of attempt to commit rape.
13. For the foregoing, this Court would set aside the impugned judgment, however, considering the evidence available on record, the offence would definitely fall under Section 354 of the IPC, because the appellant tried to outrage the modesty of the prosecutrix by trying to pull down her underwear.
14. In the result, the conviction of the appellant under Section 511 of the IPC is hereby set aside and instead thereof he is convicted under Section 354 of the IPC and sentenced to the period already undergone by him. It is informed that the appellant remained in custody for a period of 1 year 2 months 13 days. The appellant is on bail. Surety and personal bonds earlier furnished at the time of suspension of sentence shall remain operative for a period of six months in view of the provisions of Section 437-A of the Cr.P.C. The appellant shall appear before the higher Court as and when directed.
15. As a sequel, the appeal is allowed in part. Sd/-

Judge

Prashant Kumar Mishra

Gowri