

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 725 OF 2012

Poshan Sharma, S/o Shri Dau Prasad Sharma, aged about 42 years, R/o Village Sankara, Police Station- Dharsiva, District Raipur (C.G.)

... Appellant

Versus

State of Chhattisgarh, through the Station-in-charge, Police Station Pandari, District Raipur (C.G.)

... Respondent

For Appellant	:	Mr. V.R. Tiwari, Advocate.
For Respondent-State	:	Ms. M. Asha, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy

C A V Judgment

Reserved on : 25.11.2016

Delivered on : 09.12.2016

1. Challenge through the present appeal is to the judgment dated 28.7.2012 passed by the Special Judge, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Raipur, in Special Sessions Trial No. 19 of 2012.

2. By the impugned judgment, the Court below has convicted the Appellant for the offence under Sections 450 and 376 of IPC and sentenced him to undergo R.I. for 3 years with fine of Rs.2000/- and also to undergo R.I. for 7 years with fine of Rs.2000/- respectively. In default of payment of fine amounts, the Appellant was further required to undergo R.I. for 6 months on each count. All the sentences were directed to run concurrently.

3. An FIR (Exhibit P-1) was lodged on 11.1.2012 at around 21:55hrs by Durpati Bai (PW-1), mother of the Prosecutrix (PW-9), alleging that when she returned home in the evening after working at Saini Factory which situates near Siltara, she found the Appellant ravishing the Prosecutrix, her

mentally challenged daughter, who was alone at home at that time. That, as soon as the Appellant saw Durpati Bai (PW-1) he immediately put on his clothes and fled away from the scene and upon raising an alarm the nearby residents namely Darbari, Lakhan, Balmukund, Sadhram, Anant and Santosh Manhar saw the Appellant fleeing away from the place of incident. On the basis of the said complaint of Durpati (PW-1), Crime No. 14 of 2012 was registered at Police Station Dharsiva, Raipur and the matter was put to investigation. After completion of the investigation, the police authorities submitted a charge-sheet before the Court making the present Appellant an accused and he was charged of having committed the offence under Sections 450 and 376 of IPC as well as under Section 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

4. The matter was put to trial and in the course of trial the prosecution examined as many as 12 witnesses in support of its case. However, no witnesses were examined on behalf of defence. After the conclusion of the trial, the Court below vide impugned judgment found the Appellant guilty of having committed the offence under Sections 450 and 376 of IPC, however, the Court below acquitted the Appellant for the offence charged under the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Accordingly, the Court below sentenced the Appellant for the offence punishable under Sections 450 and 376 for the period as mentioned in the first paragraph of this judgment.

5. Shri Tiwari, learned Counsel for the Appellant, submits that it is a case where the prosecution has miserably failed to establish its case by leading cogent, independent and reliable witnesses. That, the Court below acting in a mechanical manner without properly appreciating the evidences which have been led by the prosecution, has convicted the Appellant for

the said offences which is not proper, legal and justified. According to Shri Tiwari, it is a case where the case of the prosecution also is not supported by any medical evidence as the authorities concerned have not been able to show any sign of injury on the body of the Prosecutrix even at her private parts. According to him, there was even no forensic report in respect of the clothes which the Appellant was wearing which when compared to the clothes that were worn by the prosecutrix-victim could have proved the case of the prosecution. That, there are major contradictions in the prosecution evidences that have been brought on record and the benefit of which should have gone in favour of the Appellant and the impugned judgment deserves to be set aside/quashed.

6. Learned Counsel for the Appellant further contends that even if the case of the prosecution is accepted in its entirety even then at best it is a case which could be brought within the ambit of only Section 509 of IPC and definitely not under Section 376 of IPC, and for the offence under Section 509 of IPC the Appellant has already undergone much more than the maximum sentence which could have been imposed upon him. Therefore, the impugned judgment deserves to be set aside and the Appellant is liable to be acquitted of the charge under Section 376 of IPC. According to Shri Tiwari, there are material contradictions in the statement of the mother of the Prosecutrix herself, i.e., PW-1 Durpati Bai. According to him, at one point of time she states that when she had entered the house she found the Appellant standing near the Prosecutrix without any dress, and at the same time in her cross-examination she has stated that when she entered the house she saw the Appellant committing sexual intercourse with the Prosecutrix.

7. Similarly, Counsel for the Appellant also suggested that from the statement of PW-2 Santosh, father of the Prosecutrix, also a different version is emanated as according to PW-2 when he reached home his wife PW-1 told him that when she was entering the house in the evening she found that the Appellant was with the Prosecutrix on the bed and when he saw her, he immediately wore his clothes and fled away from the place of incident. Thus, there are material contradictions in the statement made by PW-1 Durpati Bai at the first instance and the statement of PW-2 Santosh later on. Shri Tiwari, further submits that the story of the prosecution further gets improbable on account of the fact that when PW-1 Durpati Bai states that upon her reaching the house she saw the Appellant without any dress at her house near the Prosecutrix and at that time she could have raised an alarm and could have gathered the people around her but having not done so the version of PW-1 Durpati Bai loses her credibility and creates an element of doubt.

8. According to the Counsel for the Appellant it is only PW-1 Durpati Bai's statement which has to be given due weightage for the reason that it is she who is said to have witnessed the Appellant inside her house and is said to have seen him ravishing the Prosecutrix. Likewise, the Counsel also comparing the statement of PW-1 Durpati Bai and PW-2 Santosh submits that in the light of the statement of PW-2 Santosh having seen the Appellant fleeing from the place of incident which is denied by PW-1 Durpati Bai stating that her husband (PW-2) has not seen the Appellant running away from the place of incident, creates further doubt on the statement made by PW-1 Durpati Bai and PW-2 Santosh. Though PW-1 Durpati Bai in the FIR has stated that a large number of persons have seen the Appellant fleeing away from her house and they were also named in the FIR, but none of these witnesses have been examined by the

prosecution except PW-3 Sadharam, giving rise to a great element of doubt. Again the Counsel for the Appellant referring to the statement of PW-3 Sadharam submits that the statement of Sadharam also creates doubt, on account of the fact that in the cross-examination he has accepted the fact that the house of PW-1 Durpati Bai and PW-2 Santosh is not visible from his house, yet the PW-3 Sadharam in his examination-in-chief has made a statement that he had seen the Appellant fleeing away from the house of the Prosecutrix. This leads to a great element of doubt on the version of the said PW-3 Sadharam.

9. Shri Tiwari, learned Counsel for the Appellant, further referring to the statement of PW-12, Dr. Smita, the doctor who had examined the Prosecutrix, submits that the doctor has opined that there was no injury mark found on either the body of the Prosecutrix or at her private parts. Even the finding of the doctor was that the Prosecutrix was habitual to sexual intercourse. Therefore, all these facts lead to a great element of doubt whether the offence of rape in fact has been committed upon the Prosecutrix or not. For all the aforesaid reasons, Counsel for the Appellant prayed for the setting aside of the impugned judgment and for acquittal of the Appellant of the charges levelled against him. Counsel for the Appellant in support of his contentions has relied upon the case of **Ramkripal Vs. State of M.P.**, reported in **2007 (11) SCC 265**.

10. Per contra, Ms. Asha, learned Counsel for the State, opposing the appeal submits that it is a case where the prosecution has in fact been able to prove its case beyond all reasonable doubts and therefore the appeal deserves to be rejected. She submits that it is clearly an open and shut case for the prosecution as the Prosecutrix in her cross-examination has accepted the fact that she was subjected to sexual intercourse by the Appellant. Further, the said act is also corroborated from the statement of

PW-1 Durpati Bai, mother of the Prosecutrix, who can also be termed as an eyewitness to the incident. Once when there is a statement of the Prosecutrix which itself commands a great degree of weightage so far as the offence of rape is concerned coupled with the fact that the statement of the Prosecutrix stands corroborated from the statement of the eyewitness PW-1 Durpati Bai, according to the State Counsel nothing further remains for doubting the case of the prosecution under any circumstances and the appeal has no merits and deserves to be rejected.

11. The State Counsel took the Court through the statement of PW-9, the Prosecutrix, wherein the Prosecutrix who is a psychically challenged girl has given prompt answers to all the queries put to her by the trained instructor, PW-10 Anju Kurmi. The State Counsel has highlighted the fact that PW-10, Anju Kurmi, the trained instructor, was called upon to put suggestions and questions to the Prosecutrix taking into consideration the fact that the Prosecutrix is mentally challenged and that she is a dumb girl and not deaf and, therefore, she could easily understand the questions put but was answering by sign language to the questions put by the trained instructor. Counsel for the State further submits that in the court statement also the Prosecutrix had no hesitation in identifying the Appellant of having ravished her which she has sufficiently proved before the Court below. It was also contended by the State Counsel that the on the query being put to the Prosecutrix she has sufficiently explained as to what the Appellant had done to her inasmuch as she has specifically by her signs indicated that the Appellant had pressed her breasts and she has also indicated of the Appellant having done something at her private parts, which are sufficient indications so as to establish the offence levelled against the Appellant. Further, the State Counsel also submitted that if for any reason the statement of the Prosecutrix is not sufficient then the case further

stands proved and established from the deposition of PW-1 Durpati Bai, mother of the Prosecutrix, who is said to be an eyewitness to the incident inasmuch as when she had reached her home in the evening she found the Appellant without any dress along with Prosecutrix and on seeing her (PW-1) the Appellant is said to have fled away from the place of incident.

12. The State Counsel further submits that in case even if the medical evidence is not established that by itself cannot be a determining factor for a case of rape. According to her, all that the Court has to see is, whether the deposition which has come on record is sufficient and inspires confidence or not and whether the same reflects any element of doubt on the prosecution story or not. In addition, according to the State Counsel, the statement of PW-2 Santosh, father of the Prosecutrix, also supports the case of the prosecution and further corroborates the statement made by the Prosecutrix (PW-9) as well as Durpati Bai (PW-1). Counsel for the State thus prayed for the rejection of the appeal.

13. Having heard the rival contentions put forth on behalf of either side and on perusal of the records, what clearly reflects from the proceedings that have been drawn before the Court below is that on 11.1.2012 when the Prosecutrix (PW-9) was alone in the house, the Appellant is said to have entered into the house of the Prosecutrix and had committed rape upon her. What is also reflected from the evidences which have come on record is that the said commission of offence was witnessed by Durpati Bai (PW-1), mother of the Prosecutrix. Durpati Bai (PW-1) has categorically stated that when she reached home in the evening she found the Appellant and the Prosecutrix in a compromising position. Once when there is this cogent evidence by the prosecution supported by an eyewitness, in the opinion of this Court nothing further remains for reaching to the conclusion that the case of the prosecution stands proved. However, on further

meticulous scrutiny of the evidences which have come on record the fact that the Prosecutrix is a dumb girl is undisputed. At the same time, it is also the medical evidence which has come on record showing that the Prosecutrix was only dumb and not deaf and she could easily understand the queries being put to her and she would reply by sign language. A perusal of the statement of the Prosecutrix clearly reflects the nature of act committed by the Appellant. Another feature which cannot be brushed aside is the fact that when the victim is a physically challenged person there is no reason why she would be made instrumental for lodging a false complaint against the Appellant. Merely because the medical evidence does not support the prosecution case by itself would not make the entire case of the prosecution or the statement of the Prosecutrix to be doubtful. Neither has the defence in any manner able to bring out any sort of incriminating factor by which the case of the prosecution has to be doubted upon. In addition, another incriminating factor which goes against the Appellant is the fact that the FIR in the instant case was lodged promptly on the same day itself on which date the offence is said to have been committed by the Appellant.

14. So far as the case of **Ramkripal** (supra) which has been relied upon by the Counsel for the Appellant is concerned, the ratio of law laid down by the Supreme Court in the said case was under entirely different factual matrix of the said case and therefore would not come to the aid of the Appellant in the facts of the present case and the same is therefore distinguishable on facts itself.

15. It is trite at this juncture to rely upon the decision of this High Court in the case of **Dukaludas Manikpuri Vs. State of Madhya Pradesh**, decided on 3.2.2010 in Criminal Appeal No. 1302 of 1994, wherein under similar circumstances where the victim was again a physically challenged

person this Court relying upon the statement of the victim, affirmed the judgment of conviction in the said case.

16. The Supreme Court in the case of **Aman Kumar & Another v. State of Haryana, 2004 (4) SCC 379**, so far as the attempt of commission of offence is concerned, has held as under:

“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.

XXX

XXX

XXX

XXX

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.”

17. Since the case has been sufficiently proved and established by the prosecution by leading cogent evidence, this Court is of the opinion that the charges levelled against the Appellant stand established and the finding of the Court below holding the Appellant guilty of having committed the said offences is neither infirm nor illegal and the same does not warrant any interference.

18. Accordingly, affirming the judgment of conviction and sentence, the present appeal being devoid of merits is dismissed. The Appellant is already in jail and therefore no further order for his surrender or arrest is required to be passed.

Sd/-
(P. Sam Koshy)
Judge