

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.138 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- GAYA

Prabhu Yadav sonfo Late Bishun Yadav residentof village Khutha P.S. Rurua
District Gaya.

.... Appellant

Versus

State of Bihar

.... Respondent

Appearance :

For the Appellant : Mr. Bibhuti Narayan, Adv.
Mr. Ashok Kumar

For the Respondent : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
ORAL JUDGMENT

Date: 18-01-2018

The sole appellant stands convicted under Section 376/511
of the Indian Penal Code (hereinafter to be referred as ‘the IPC’) and
sentenced to undergo RI for five years and fine of Rs.2,000/- with
default clause.

2. It appears that the prosecution was initiated on the basis
of a written report filed by P.W.4 (Lalaswa Devi) stating therein *inter*
alia that in the night while she was preparing food, the appellant
entered inside the house and thrashed her on the ground and attempted
to commit rape upon her but on *hulla*, he fled away. On the basis of
the written report, the FIR was registered and after investigation, the
charge sheet has been submitted and the cognizance has been taken
and the case was committed to the court of sessions, which ultimately
came to the file of Sri Ram Pravesh Sharma, learned Vth Additional



Sessions Judge, Gaya for its trial and disposal.

3. During the trial, seven witnesses have been examined in this case - P.W.1 Jagruk Noniya declared hostile, P.W. Jugal Chauhan, P.W.3 Arun Chauhan, P.W.4 Lalaswa Devi informant, P.W.5 Vijay Nonia, P.W.6 Mahngu Noniya and P.W.7 Raja Ram Singh ASI, who is I.O. of the case.

4. On behalf of the defence, no oral or documentary evidence has been adduced, however, as per the statement made under Section 313 of the Cr.P.C. and from the trend of cross examination, it appears that the defence of the appellant is of false implication due to old enmity and they are innocence.

5. Learned trial court after considering the evidence on record convicted the appellant under Sections 376/511 of the IPC and sentenced them as stated above.

6. Submissions of the learned counsel for the appellant is that no case is made out under Sections 376/511 of the IPC. Furthermore he has been falsely implicated in this case due to enmity, which will appear from the evidence of P.W.4 (informant) as she has stated that the appellant was not known to the informant and his name was disclosed by other persons. Further submission is that no offence is made out under Section 376/511 of the IPC as evidence only discloses that she was thrashed on the ground and appellant tried to



commit rape, as such at best this case comes under the purview of Section 354 of the IPC.

7. On the other hand, the learned counsel for the State has supported the judgment of conviction and submitted that on the basis of the materials; the same is sustainable in the eye of law.

8. On close scrutiny of the evidence as stated above, it appears that P.W.4 (informant) is the only eye witness of the occurrence and she has supported the prosecution case as alleged in the written report that the appellant entered inside the house and thrashed her on the ground to commit rape on the assurance that she has no issue and if she agrees to sleep with him, she would have an issue, however, she raised *hulla* and he fled away from there and other persons also assembled there and this witness has also identified the appellant in dock. No doubt she has stated that the appellant was not known to her from before and her name was disclosed by other persons in the cross examination but that does not discredit her evidence in chief.

9. So far other witnesses are concerned, P.W.1. has been declared hostile, P.W. 2 has stated that the informant has disclosed about the occurrence to him and he has not seen the occurrence, P.W.3 has stated that he had seen the appellant fleeing, P.W.5 had stated that when he went near the house of Lalaswa Devi he saw



Prabhu Yadav fleeing away and P.W.6 has also stated that he saw the appellant fleeing away and P.W.7 is the I.O. of the case.

10. From the evidence as discussed above, it appears that there is solitary evidence of P.W.4 (informant) that the appellant entered inside the house and thrashed her on the ground and on being raised *hulla* by her, he fled away, though the other witnesses are not eye witness of the occurrence but they had seen the appellant fleeing from the place of occurrence. Now the question arises as to whether the above evidences constitute an offence under Section 376/511 of the IPC.

11. The Hon'ble Apex Court in a decision reported in the case of *Aman Kumar & Anr. – Vrs. State of Haryana* reported in *AIR 2004 SC 1497* has dealt with the matter in para nos. 9 to 11 as follows :-

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 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. 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.

12. The aforesaid decision of the Hon'ble Apex Court categorically shows that there is clear demarcation between the preparation and attempt. In the present case, there is only allegation that she was thrashed on the ground and he tried to commit rape upon her but she raised *hulla* and the appellant fled away, as such the case at best comes under the purview or under the definition of Section 354 of the IPC to outrage the modesty of the informant.



13. The learned trial court has not considered the aforesaid aspect of the matter and convicted the appellant under Section 376/511 of the IPC.

14. Considering the discussions as made above, conviction of the appellant under Sections 376/511 of the IPC is modified to Section 354 of the IPC.

15. So far sentence is concerned, it appears that on perusal of the record that the appellant has remained in custody for about eight months, the appellant is sentenced under Section 354 of the IPC to the period during which he has already remained in custody.

16. So far fine of Rs.2,000/- is concerned, the appellant is exonerated from paying it.

17. With the aforesaid modification in conviction and sentence, this appeal is disposed of.

(Vinod Kumar Sinha, J)

chn/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	
Transmission Date	

