

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Criminal Appeal No.1570-SB of 2007

Date of Decision:03.02.2018

Jai Parkash

.....Appellant

Versus

The State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present: Mr. Sanjeev Sharma, Legal Aid Counsel,
for the appellant.

Mr. Ayuwan Singh, AAG Haryana.

AVNEESH JHINGAN, J.(oral)

The appellant has faced trial in case FIR No. 53 dated 04.05.2006 registered at Police Station Siwani under Sections 376/323/511 of the Indian Penal Code (for short 'IPC')

Vide judgment dated 13.01.2007 learned Additional Sessions Judge, (Fast Track Court), Bhiwani, convicted the appellant for offence punishable under Sections 376(2)(f) read with Section 511 IPC and 324 IPC.

Vide order dated 16.01.2007 the appellant was sentenced as under:

Under Section 376 (2)(f) IPC read with Section 511 IPC	Rigorous imprisonment for a period of five years and to pay a fine of Rs.5000/-. In default of payment of fine, convict shall further undergo rigorous imprisonment for a period of six months.

Under Section 324 IPC	Rigorous imprisonment for a period of two years and to pay a fine of Rs.1000/-. In default of payment of fine to further undergo rigorous imprisonment for one month.

Both the substantive sentences were ordered to run concurrently.

The brief facts of the case are that on an application made by Umed Singh, the police party headed by ASI Johari Lal registered a FIR. In the complaint it was stated that Umed Singh alongwith Ram Chander son of Udmi Ram resident of Dhani Balhara on 04.05.2006 at about 6:00 p.m. were going towards southern side of the village to answer the call of nature. On their way they heard cries of a girl from the side of Tibba (sand dune). On reaching the spot, they found that accused had removed his trouser and under wear and was attempting to commit rape upon a girl, who was also un-dressed. On inquiry he told his name was Jai Parkash son of Maman Ram resident of Hasan. The victim and accused were made to wear their clothes. The victim was sent to her home whereas the accused was being taken to Police Station Siwani, where on the way he was produced before the police. Johari Lal ASI made an endorsement on the application and FIR was registered. The accused and the victim were got medico-legally examined. After investigation, report under Section 173 Cr.P.C. was submitted against the accused.

The case was committed to Sessions Court. The accused was charge-sheeted under Section 376 (2) (f) and 324 IPC. Accused pleaded not guilty and claimed trial. The prosecution in order to prove its case examined as many as eight witnesses. The accused was examined under Section 313 Cr.P.C. wherein he pleaded innocence. The accused opted not to lead any

evidence in defence.

During trial the Court came to the conclusion that the victim because of her tender age was not able to give rational answers to simple questions. She was found not to be a competent witness.

Complainant Umed Singh was examined as PW4. He supported the case of the prosecution and reiterated his complaint. He further stated that he had seen bite marks on the cheek of the victim. Ram Chander eye witness appeared as PW7. He narrated the entire incident. He stated that the accused was being taken in a maruti car to Police Station Siwani but the police met them on Loharu turning where he was handed over to them.

Doctor Karambir PW1 medico-legally examined the accused. He stated that smegma was not present and male external genitalia were well developed. There was nothing to suggest that person was incapable to perform sexual intercourse.

PW5 Doctor Sudha Garg examined the victim. The age of the victim was stated to be six years. She found mark of teeth bite 1 x 1 centimeter on the left cheek. She stated that there were no injury mark present on any part of the body. No injury was found on external genitalia and no bleeding was present. Slight redness was present on the right side of orifice. She stated that possibility of attempt to sexual assault could not be ruled out as there was light redness present on the right side of vaginal orifice. It was not concluded by her that slight redness was due to sexual assault.

PW2 Hoshiar Singh who is Patwari proved the site plan. Johari Lal ASI Investigating Officer of the case deposed as PW8.

Learned Additional Sessions Judge, Bhiwani, after hearing the

arguments and taking into consideration the evidence produced held that offence committed by the accused fell short of actual commission of rape but keeping in view the age of the victim, the accused was convicted for attempt to rape under Section 376 (2)(f) read with Section 511 IPC. The accused was also convicted under Section 324 IPC for giving teeth bite on the cheek of the victim.

Section 376(2) before amendment in 2013 is reproduced below:

"376. Punishment for rape-

xx xx xx xx
(f) commits rape on a woman where she is under twelve
years of age: or
xx xx xx xx
shall be punishable with rigorous imprisonment for a term which
shall not be less than ten years but which may be for life and shall
also be liable to fine:

Provided that the Court may, for adequate and special
reasons to be mentioned in the judgment, impose a sentence of
imprisonment of either description for a term of less than ten
years."

Learned counsel for the State has filed custody certificate issued by Sh. Amit, Deputy Superintendent, District Prison (Bhiwani) Haryana. As per the said certificate the accused has undergone three years, four months and twenty-one days of actual custody. After adding the earned remission, he has undergone four years, one month and five days. There is no other case pending against the accused. The accused is on bail since 25.09.2009.

Learned counsel for the appellant submitted that both the alleged eye witnesses were not present at the place of occurrence as they were giving contradictory statements with regard to place of occurrence. He further stated that there is a contradiction in his statement regarding the

place where the statement was scribed. He further argued that no rape was actually committed.

Learned counsel for the State contended that the prosecution was able to prove attempt to rape and offence committed under Section 324 IPC. There were not one but two eye witnesses and the medico-legal report corroborated the narration of the eye witnesses regarding teeth mark on the left cheek of the victim.

Learned Additional Sessions Judge, has dealt in detail regarding the contradiction in the statements of eye witnesses with regard to the place of occurrence. As per the rough site plan Ex.PC the place was towards southern eastern side of the village. The contradiction pointed out by learned counsel for the appellant is that one of the witness stated that the place was on southern side and another witness stated that it was on western/eastern side. Inconsistency in stating the direction of place of occurrence (in the fact of the present case) would not be fatal to the case of the prosecution. The presence of the accused and the victim at the place of occurrence was duly proved.

The eye witnesses stood the test of cross-examination to prove that the accused was apprehended at the place of occurrence and at that time both the victim and accused were un-dressed. Not only this, the statement of Doctor Sudha Garg PW5 is corroborated by the statement of the eye witnesses that there was teeth bite mark on the left cheek of the victim. It has also come on record that the victim did not belong to the same village as the eye witnesses were. Apart from the bald statement that there was animosity of the eye witnesses with the appellant, no detail regarding animosity and no evidence to support the same was produced.

The statements of eye witnesses read with the medico-legal report fully establish the case of the prosecution regarding attempt to rape the victim. Learned Additional Sessions Judge has only convicted the accused for attempt to rape a girl below 12 years. The argument of learned counsel for the appellant that no rape was committed need not be gone into.

The conviction of the appellant under Section 376 (2)(f) read with 511 IPC is upheld. So far as the sentence under Section 324 IPC is concerned, the appellant has already undergone the same.

Hon'ble the Apex Court in case of **Koppula Venkat Rao Versus State of Andhra Pradesh** Appeal (Crl.) 84 of 1998 decided on 10.03.2004 has held as under:

"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.

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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."

Hon'ble the Apex Court in the decision has held that even if the attempt to rape was not successful, the act is punishable under Section 511 IPC.

Hon'ble the Apex Court after considering the evidence in proper prospective and the fact that rape was not actually committed but attempt to commit rape was proved and held that custody of three and half years would meet ends of justice.

In the present case, learned Additional Sessions Judge, has held that rape was not committed. The appellant was convicted for attempt to rape which has been upheld in this order. The appellant has faced trial for almost 12 years. The appellant is a poor person having aged parents; three younger sisters; being the only bread earner of his family; not a previous convict and keeping in view the fact that he has already undergone four years, one month and five days including the remission earned the period

already undergone, would meet the ends of justice. As per the custody certificate, the appellant is on bail since 25.09.2009 and not involved in any other criminal case shows that he has mended his ways.

In view of the above, the judgment of conviction is upheld and the order of sentence is modified to the extent that the sentence under Section 376(2)(g) IPC is reduced to the period already undergone.

The bail bonds of the appellant be released subject to payment of fine.

The appeal is disposed of accordingly.

(AVNEESH JHINGAN)
JUDGE

03.02.2018

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Whether speaking/reasoned
Whether Reportable:

Yes/No
Yes/No