

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

CRM-M-5667 of 2018.

Decided on:- May 20, 2019.

Rubeena Malik.

.....Petitioner.

Versus

State of Haryana and others

.....Respondents.

CORAM: *HON'BLE MR. JUSTICE HARI PAL VERMA.*

Present:- Mr. Kamal K. Chaudhary, Advocate for
 Mr. Gaurav Singla, Advocate
 for the petitioner.

HARI PAL VERMA, J.

The petitioner has filed present petition under Section 482 Cr.P.C. for setting aside of order dated 19.09.2017 (Annexure P-7) passed by learned Additional Sessions Judge, Faridabad, whereby the application under Section 227 Cr.PC moved by respondents No.2 and 3 for their discharge in FIR No.152 dated 23.10.2016, initially registered under Sections 354(A)(1), 451 and 506 IPC and subsequently added Sections 376 and 511 IPC at Police Station Women, Sector 16-A, Faridabad, was partly allowed.

Vide impugned order, learned Additional Sessions Judge has held that there is sufficient material on record against respondent No.2 Raj Pal Malik to face trial for offence under Sections 354, 451 and 506 IPC, however,

for respondent No.3 Gagandeep Malik, there is sufficient material (phone call details also) to frame charge under Section 506 IPC against him. Learned Additional Sessions Judge has further held that no case is made out against the respondents-accused under Section 376 and 511 IPC.

Briefly stated, the aforesaid FIR was registered on the statement of the petitioner, who was married with Navdeep Malik, who is a son of respondent No.2 and brother of respondent No.3. As per the FIR on 12.10.2016 at about 08.30 P.M. when the complainant after finishing her kitchen work was going to her room, respondent No.2 Raj Pal Malik (father-in-law of the complainant) who was in drunken condition, after seeing an opportunity, caught hold the hand of the complainant, pulled her inside his room and hold her from back side. He threw the complainant on bed and hit his hand on her breasts. When the complainant started shouting loudly, respondent No.2 shut her mouth. On hearing the loud voice, her brother Aakashdeep came there and upon seeing her brother, accused Raj Pal Malik left her and after that, he started abusing her brother and used filthy language against her. The accused has further threatened that if this incident is disclosed by the complainant to any other person, he will kill her. After 15-20 minutes, a phone call from respondent No.3 Gagandeep Singh (brother-in-law of the complainant) came on her phone and he said that the complainant should ask her brother to go from the house otherwise, he will teach a lesson to them. He further directed to obey as per the dictate of his father as the house is owned by him (Raj Pal Malik).

On the aforesaid statement, the FIR in question was initially registered under Sections 354(A)(1), 451 and 506 IPC against respondents No.2 and 3, however, later on, after investigation, the offence under Sections 376 and 511 IPC was added. The aforesaid FIR was investigated and learned Magistrate vide order dated 08.06.2017 had committed the case to the Court of Session for trial.

During the proceedings before learned Additional Sessions Judge, respondents No.2 and 3 moved an application under Section 227 Cr.PC for their discharge in the case on the ground that they have falsely been implicated in the case by the petitioner-complainant. The complainant is daughter-in-law of respondent No.2 and sister-in-law of respondent No.3. As per the application filed by respondents No.2 and 3, the petitioner-complainant was married with Navdeep Malik and after marriage, she started quarrelling with her mother-in-law in particular and other family members. The father of complainant supported the complainant. Respondent No.2 who was working with the Oil and Natural Gas Corporation (ONGC), has retired in the month of December, 2014 from the post of Deputy General Manager (Legal). Respondent No.2 has incurred lakhs of rupees for further study/education of the petitioner-complainant, who passed her MBA, B.Ed. and JBT after marriage. A son Krishan Malik was born to her and as the salary of Navdeep Malik was not sufficient, respondent No.2 had borne all the expenses of his grandson and is still bearing the expenses of his study/school fee. In addition thereto, the financial assistance is being rendered from time to time.

Vide impugned order dated 19.09.2017, learned Additional Sessions Judge, Faridabad partly allowed the aforementioned application under Section 227 Cr.PC moved by respondents No.2 and 3. The Court held that no case under Section 376 read with Section 511 IPC is made out against the accused in the case. It held that there is sufficient material on record that respondent No.2 i.e. Raj Pal has committed offence under Sections 354, 451 and 506 IPC whereas there is sufficient material to proceed against respondent No.3 Gagan Deep to frame charge under Section 506 IPC. The relevant paragraphs No.13 to 15 of the impugned order dated 19.09.2017 read as under:

“13. The first statement of the prosecutrix was recorded under Section 161 Cr.P.C where she has stated that her father in law caught her hand, pulled her towards his room after catching from behind laid her on the bed and he struck on her breasts with his hands. When she shouted, then her father in law gagged her mouth, but her brother rushed there. She released her statement under Section 164 Cr.PC by stating that her father in law caught her hand, took her in his room. When she made a try to rescue herself, he caught her and pushed her on bed and made a try to force himself upon her. When she shouted, then her brother and son came and she was relieved by her father in law. So, this is the crux in the statements of the prosecutrix.

14. Rape is defined in Section 375 IPC where words ‘penetration’, ‘insert’, ‘applying mouth of the male to the private parts of the woman’ have been used, but in this case, nothing is in the statement of the prosecutrix regarding penetration of any male organ to any extent in the private part of the prosecutrix. Nothing is in the statement that accused inserted to any extent

any object or any part of the body to the private part of the woman. Also there is nothing in the statement that accused applied his mouth to the private part of the prosecutrix. So, the natural corollary is that provisions of Sections 376/511 IPC would be attracted in case the accused tried to penetrate, insert any object or apply his mouth to the private part of the woman. It is also clear from statements of complainant that accused neither undressed himself nor he undressed the prosecutrix in any manner. The only attribution to the accused is that he caught hold of prosecutrix, laid her on the bed and struck his hand on the breasts of prosecutrix. So what to talk about the penetration when there has not been any attempt of penetration to the slightest degree. He even did not ask the prosecutrix to undress herself. So, there was no question of penetration. The 11 years child as well as brother of the prosecutrix were present in the same home in adjoining room. Accused did not close or shut down the door of his room. He immediately fled away from the spot when brother of the prosecutrix as well as her son rushed at the spot.

15. So, there is nothing on record in the statement of the prosecutrix that accused Raj Pal made an attempt to commit rape. Even from the statements of complainant, preparation to commit the offence is not complete what to talk about attempt. So, this case is a case of indecent assault upon a woman at the most. Essential ingredients of offence punishable under Section 354 IPC are that the person assaulted must be a woman and the accused must have used criminal force on her intending thereby to outrage her modesty. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an

attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of catching a woman, pulling her or touching her breasts would be an act of outraging the modesty of the woman. So, prima facie, there are sufficient materials on record that accused No.1 namely Raj Pal has committed offence under Sections 354, 451 and 506 IPC. For accused No.2 namely Gagan Deep, there are sufficient material (phone call details also) to frame charge under Section 506 IPC against him. Since the said offences are triable by Judicial Magistrate 1st Class, so after allowing the present application to the extent that no case is made out against the accused under Sections 376, 511 IPC, but charge is to be framed against accused Raj Pal under Sections 451, 354, 506 IPC and under Section 506 IPC against accused Gagan Deep, the case is remitted back to Ld. Chief Judicial Magistrate, who shall either try the case himself or transfer the same to any Judicial Magistrate 1st Class of competent jurisdiction. Parties are directed to appear before Ld. CJM, Faridabad on 26.9.2017. So, the present application is disposed off in above terms by remitted the matter.”

It is against the order dated 19.09.2017 passed by learned Additional Sessions Judge, Faridabad, the complainant has preferred the present petition.

Learned counsel for the petitioner has argued that earlier the police had not registered the FIR for offence under Sections 376 and 511 IPC. From a bare perusal of the contents of the FIR as well as statement of the petitioner under Section 164 Cr.PC, it is clearly established that an attempt of rape was made by respondent No.2 as he caught hold her hand and fell her down on the bed and tried to commit rape upon her. Therefore, catching a

woman from behind and then falling her on bed, clearly shows his intention to commit the offence of rape. The accused need to be tried for offence under Sections 376 and 511 I.P.C.

He has further argued that in this illegal act, respondent No.3 had helped his father by threatening the petitioner on phone call immediately after the incident and thereafter, when he came to the house of the petitioner, he gave threat to the petitioner to kill her and destroy her life. Thus, learned Additional Sessions Judge had committed an error in not appreciating the facts and the accused were required to be tried under Sections 376 and 511 I.P.C.

I have heard learned counsel for the petitioner.

There is a long drawn history of matrimonial discord between the petitioner and her husband. The husband of petitioner is allegedly a drug addict and respondents No.2 and 3 got him admitted in Rehabilitation Centre, Delhi. Apart from the fact that there are contradictions in the statements of the prosecutrix while recording her statements under Section 161 and 164 Cr.PC, Aakashdeep, who is brother of the petitioner-complainant, has not supported her case in his statement under Section 161 Cr.PC in the manner in which the complainant has detailed her version. Respondent No.2, who is father-in-law of the petitioner-complainant is a retired man and no person could dare to commit such an attempt knowing fully well that brother of the complainant and her son, who is about 11 years of age, were present in the house at the time of alleged incident.

Hon'ble Supreme Court in ***Aman Kumar and another Versus State of Haryana 2004(1) RCR (Criminal) 925*** held that if the accused was determined to have sexual intercourse at all events despite resistance by the prosecutrix, it would amount to an offence of attempt to commit rape, but at the same time, if there was no intention to commit rape, it would amount to indecent assault upon a woman punishable under Section 354 I.P.C.

Similarly, in ***State of Rajasthan Versus Sri Chand 2015(2) RCR (Criminal) 1011***, Hon'ble Supreme Court while referring the earlier judgment in ***Aman Kumar and another's case (supra)*** held that to make out an offence of attempt to rape, the accused must have so advanced in his actions that it would have resulted into rape had some extraneous factors not intervened. The observations made by the Apex Court in paragraph No.8 of the judgment read as under:

“8. We find that that FIR was recorded under Section 376 read with Section 511 of IPC i.e. attempt to rape and not rape per se. There is no eye witness on record apart from the prosecutrix herself as PW3 Biharilal only saw the accused fleeing away and Saroj, the alleged eye witness, was never produced before the Court nor her statement was recorded under Section 161 Cr.P.C. Also, no medical examination of the prosecutrix has been conducted. The prosecutrix has in her statement stated that the accused Sri Chand took her inside her house, closed it, undressed her and undressed himself. Thereafter, she states, he got on to her and did bad work. On being repeatedly asked what bad work was done, she kept quiet and bowed her head, in embarrassment understandably. One must not lose sight of the fact that the prosecutrix was a minor child at the time of the incident. The father (PW6) of the

prosecutrix has categorically stated that bad work meant rape. However, we find difficulty in veracity of his statement since he was not an eye witness and was not even told about the incident by the prosecutrix. He was told details of the incident by Biharilal (PW3) who is not an eye witness to the incident. However, Biharilal was the first person to have learnt of the offence from the prosecutrix and he has completely corroborated her version. By this consistent evidence what is proved beyond reasonable doubt is the offence under Section 354 of IPC. However, the question of attempt to rape is not proved beyond reasonable doubt. On the question of attempt to rape, learned counsel appearing for the respondent has sought to rely on two precedents being Aman Kumar and Anr. Vs. State of Haryana, (2004) 4 SCC 379, and Tarkeshwar Sahu Vs. State of Bihar (now Jharkhand), (2006) 8 SCC 560. In both the cited judgments it is held that for the act to constitute offence of rape penetration is pre-requisite (this is the pre 2013 Criminal Amendment position of law) and therefore for the offence of attempt to rape the accused must have so advanced in his actions that it would have resulted into rape had some extraneous factors not intervened. It is held in Aman Kumar's case that in order to come to the conclusion that attempt to rape is committed it should be shown that the accused was determined to have sexual connection (penetration) with the prosecutrix at all events inspite of all resistance. In the present case the accused fled away on when the PW3 came to the place of incident due to shouting of the prosecutrix. This shows he wasn't determined to have sexual connection with the prosecutrix despite all resistance and odds. Also it would be relevant to note that there are inconsistencies in the statement of the prosecutrix wherein she states that she had suffered injuries on her breast but same is not corroborated by the medical evidence. Also, Saroj, who is an important eye

witness, is not produced as a witness. In this view of the matter, we find it difficult to hold that offence of attempt to rape is proved to a sufficient measure.”

This Court in ***Angrej Singh Versus State of Haryana 2011(22) RCR (Criminal) 568*** while holding the accused guilty under Section 354 IPC and acquitting him for offence under Section 376 read with Section 511 IPC has observed that the point of distinction between an offence to commit rape and to commit an indecent assault is that there should be some action on the part of the accused which would show that he is just going to have sexual connection with the victim.

In the present case, statement of the prosecutrix nowhere suggests that the accused had either undressed himself or undressed the prosecutrix in any manner. The only allegation against him that he caught hold the prosecutrix, laid her on the bed and struck his hand on her breasts. There was no allegation of any attempt of penetration of the slightest degree. Respondent No.2-accused even did not ask the prosecutrix to undress herself. Moreover, brother of the prosecutrix and her own son, aged about 11 years, were present in the same house, though in the adjoining room. The accused did not close or shut out the door of his room. Rather, the accused left the victim when her brother came to the place of incident due to her shouting. This shows the accused was not determined to have sexual connection with the victim despite all resistance.

Therefore, considering the statement of the complainant upon which the FIR is based and the law laid down in ***Aman Kumar and another's***

case (supra); *Sri Chand's case (supra)* and *Angrej Singh's case (supra)*, this Court finds that there is no illegality in the impugned order dated 19.09.2017 passed by learned Additional Sessions Judge, Faridabad as no case for commission of offence under Sections 376 and 511 IPC was made out and the case was remanded back to the Chief Judicial Magistrate for further proceedings including framing of charge.

Accordingly, the present petition, being devoid of any merit, is dismissed.

The observations made hereinabove shall not be construed as an expression of opinion on the merits of the case and the trial Court shall decide the case without being influenced with these observations in any manner.

May 20, 2019
Yag Dutt

(HARI PAL VERMA)
JUDGE

Whether speaking/reasoned: Yes

Whether Reportable: No