

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

CRL.A. 1208/2015

Reserved on : 8th July, 2019.
Date of Decision: 29th July, 2019.

IN THE MATTER OF:

DURGESH PANDEY

..... Appellant

Through : Mr. Aditya Vikram, DHCLSC
with Mr. Avinash, Advocates.

versus

STATE

..... Respondent

Through : Mr. Sanjeev Sabharwal, APP for
the State with SI Devendera
Rawat, PS Timarpur, Delhi.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J.

1. By way of the present proceedings, the appellant has challenged the judgment of conviction dated 22nd July, 2015 and order on sentence dated 28th July, 2015 passed by ASJ, Special FTC-2 (Central) in Sessions Case No.05/2015 arising out of FIR No.787/2014 registered under Sections 376/511/354 IPC at PS Timarpur. Vide above judgment, the appellant was convicted for the offences punishable under Sections 376(2)(j) and Section 376(2)(l) IPC and was awarded rigorous imprisonment for 10 years along with fine of Rs. 5,000/- in default whereof he was directed to undergo simple imprisonment for two years.

2. The following facts were noted by the Trial Court in the impugned judgment: -

“1. The case in hand was registered on a complaint (Ex. PW 2/A) of one Sh. Sudesh Rathi. The complainant is working as a

driver in DTC. On 14.11.2014 at about 12:30 AM while he was returning to his house at Gopalpur on his motorcycle, on turning to main Outer Ring Road, he saw one boy lying on top of the girl near a footpath near Gopalpur and also found that girl was in nude condition while the pant of the boy was lowered below his knees.

2. Complainant, Sudesh Rathi made a call to his 'Chacha' sh. Raj Singh Bhati and asked him to come at the spot. When his Chacha reached at the spot, they tried to remove boy, but he did not move from over top of the girl. Thereafter, Sudesh Rathi made a call at 100 number from mobile of his Chacha bearing No. 8800994522. PCR van reached at the spot and separated the boy, who was lying on top of that girl. On enquiry his name was revealed as Durgesh Pandey. The girl was, however, unable to state her name. PCR officials gave the clothes to the girl and took both of them along with them in the PCR van.

3. The victim was taken for medical examination at Aruna Asaf Ali Hospital where W. SI Saroj Devi reached upon receipt of DD No. 5A Ex. PW 1/B where ASI Narender Singh met her. W. SI Saroj Devi obtained MLC of the victim. The doctor opined that victim was unable to tell anything about the incident. After the registration of FIR, on the basis of complaint of Sudesh Rathi Ex. PW-2/A, the Investigating Officer prepared the site plan of place of incident, got the spot inspected by the Crime Team, also took photographs and got the victim counselled from one NGO official. Accused was arrested and taken for medical examination. The exhibits of the accused as well as victim which were taken by the respective examining doctors, were also taken into police possession and victim was referred to IHBAS for treatment, after obtaining necessary orders in this regard from the court of concerned MM.

4. Information regarding the said missing girl was conveyed to nearby Police Stations through 'Zipnet', but no clue regarding victim was received.

5. However, on 20.11.2014 one boy namely 'BB' resident of Gujarat lodged the report regarding missing of his sister, at

PS Timparpur vide DD No. 32A on 20.11.2014. On the next day, he brought photograph of his missing sister to the PS. He was taken to IHBAS where he identified the aforesaid victim as his sister. The victim was produced before concerned MM for recording of her statement under Section 164 Cr.P.C. However, Ld. MM was of the view that the victim appeared to be suffering from mental instability and her statement could not be recorded under Section 164 Cr.P.C.”

3. After completing the investigation, a charge sheet was filed. The Trial Court vide order dated 9th April, 2015 framed the charges under Sections 376 (2) (j) IPC and 376 (2) (l) IPC against the appellant.

4. During the trial, the prosecution examined a total of 16 witnesses. Sudesh Rathi and Raj Singh, the two independent witnesses, were examined as PW-2 and PW-4 respectively. Dr Valvi Kuldeep Tapsingh and Dr. Shaili were examined as PW-6 and PW-5 to prove the MLC of the prosecutrix. The prosecutrix was examined without oath as it had come on record that the prosecutrix was differently abled and not capable of understanding the meaning of oath. It has also come on record that from time to time, the medical reports of examination of the prosecutrix were called from the “Institute of Human Behaviour and Applied Sciences” (IBHAS). Dr Om Prakash, Associate Professor of Psychiatry, a member of the Board who had examined the prosecutrix and given an opinion about her mental status, was examined as PW-16. The other witnesses were police officials associated with various stages of the investigation.

5. Mr. Aditya Vikram, learned counsel for the appellant, has argued that the appellant has been falsely implicated; that the ingredients of the offence as required under the charged section are not made out in the facts of the present case; that it has not been conclusively proved on

record that the prosecutrix was incapable of giving consent; that none of the witnesses deposed about the factum of rape committed by the appellant. He submitted that the evidence which has come on the record only points to the circumstance that the appellant was found lying on the prosecutrix, on a footpath. While the prosecutrix was in naked condition, the pant of the appellant was lowered up to his knees. Mr. Vikram further argued that neither the medical evidence nor the scientific evidence, in terms of the MLC and the DNA report, conclusively proved the factum of rape. He thus argued that no evidence has come with respect to penetration by the appellant.

6. Mr. Sanjeev Sabharwal, learned APP for the State on the other hand supported the judgment and further submitted that the appellant was arrested from the spot and the DNA report rather confirmed his involvement.

ANALYSIS

7. Sudesh Rathi, the complainant, was examined as PW-2. In his testimony he deposed that he was working as a driver in the DTC and while returning on his motorcycle from his job, he reached near Gopalpur More at about 12:30 A.M when he saw that the appellant was lying on top of the prosecutrix. He deposed that the prosecutrix was in naked condition and the appellant also had his pant lowered up to his knees. He called Raj Singh, his uncle who lived nearby, from his phone. When Raj Singh reached, they both tried to remove the appellant from the prosecutrix however, they failed to do so. Thereafter, PW-2 made a call at 100 number from Raj Singh's mobile phone (No. 8800994522).

The witness further deposed that when police reached and enquired from the prosecutrix, she was unable to give her details despite being asked by the police officials. The PCR officials took the appellant and the prosecutrix to the hospital. The witness identified the appellant in Court.

8. During the cross-examination, the witness replied that there was street light at the place of occurrence. He also replied that the PCR officials took the appellant and the prosecutrix with them in PCR van. It is noteworthy that a suggestion was given to the witness that the appellant was only standing on the road and was enquiring about his way to Karawal Nagar and also that there was no girl at the place of occurrence.

9. Mr. Raj Singh (uncle of PW-2) was examined as PW-4. The testimony of PW-4 is cumulative to the testimony of PW-2. The witness deposed that PW-2 tried to remove the appellant away from the prosecutrix, however, he failed to do so. A call at No. 100 was given by PW-2 from the mobile phone of the witness after which PCR came and removed both the appellant as well as the prosecutrix to the hospital. The witness identified the appellant in Court.

10. The statement of the above two independent witnesses was corroborated by HC Babrik Kumar (PW-10), who was Incharge of the PCR Van that reached the spot. He deposed that on reaching the spot he saw the appellant lying on the prosecutrix and the prosecutrix was in naked condition. He made the prosecutrix wear cloths and took her to Aruna Asaf Ali Hospital in the PCR Van. He identified the appellant in Court.

11. The PCR form with respect to the aforesaid call made by PW-2 was proved by SI Saroj Devi as Ex. PW-15/J.

MLC

12. The prosecutrix was medically examined by Dr. Valvi Kuldeep Tapsing (PW-6) on 14th November, 2014 at about 1:40 am vide MLC exhibited as Exhibit PW-5/A. As per the MLC, it was observed that the prosecutrix though conscious was not talking properly. It noted superficial abrasion present on the right side of her chin area. The prosecutrix was referred to Sr Gynae, where she was examined by Dr Shaili (PW-5). On Per Speculum examination (P/S) of the prosecutrix, it was recorded that “hymen torn old”. In the MLC, following observations were mentioned:-.

<i>“O/H (Obstetric history)</i>	<i>??</i>
<i>M/H (Menstrual history)</i>	<i>??</i>
<i>Menstrual blood test</i>	<i>??”</i>

13. A perusal of the record shows that neither in the MLC of the prosecutrix nor in the testimony of both the doctors who had medically examined the prosecutrix, any injury was mentioned in the internal examination of the prosecutrix. It is appalling that neither the doctors gave any clarification nor such clarification was asked for either by the APP or the court to find out if any test was conducted to check whether the blood mentioned in the MLC or found on the clothes of the appellant as well as the prosecutrix was menstrual.

14. The MLC of the appellant was exhibited as Ex. PW-15/E. The appellant was arrested from the spot and was taken along with the

prosecutrix to the hospital by the PCR officials. The medical examination of the appellant was conducted at 1:39 am on 14th November, 2014. As per the MLC, alcohol intake presence was noted. During his local examination, it was also noted that “No smegma was present”.

FORENSIC EVIDENCE

15. The exhibits collected during the investigation were sent to the FSL. The DNA examination report dated 8th July, 2015 was exhibited as Ex. PW-15/K. As per the said report, the DNA profiling (STR analysis) performed on the exhibits was sufficient to conclude that:

“1. The DNA Profile generated from the source of exhibits ‘2a’ (petticoat of victim), ‘2b’ (Saree of victim), ‘2c’ (blouse of victim) is similar with DNA profile generated from the source of exhibit ‘1p’ [Blood collection of victim (EDTA)].

2. The mixed DNA Profile generated from the source of exhibits ‘6a’ (Banyan of accused) and ‘6b’ (underwear of accused) is similar with DNA Profile generated from the source of exhibit ‘1p’ [Blood collection of victim (EDTA)].

3. The mixed DNA Profile generated from the source of exhibits ‘6a’ (Banyan of accused) & ‘6b’ (underwear of accused) is similar with DNA Profile generated from the source of exhibit ‘5’ (Blood Gauze of Accused).”

STATEMENT OF THE PROSECUTRIX

16. The case of the prosecution hinges on the fact that on account of her being differently abled, the prosecutrix was not capable of giving any consent. The mental condition of the prosecutrix was verified through various reports submitted by IHBAS from time to time. The final report

by the Medical Board was proved by Dr. Om Prakash (PW-16), who was a member of the Board which had assessed the prosecutrix. As per the opinion of the Medical Board, the prosecutrix was diagnosed as a case of mental retardation (Social Quotient, in short SQ=32) without behavioural problems. It was opined that the prosecutrix was unfit to provide any statement. On a Court question about the meaning of SQ=32, it was replied that the prosecutrix was suffering from severe mental retardation, having difficulty in understanding and expressing her agreement or disagreement in any matter.

17. The prosecutrix was not able to say anything to the Doctors during her medical examination. Even at the time of recording of her statement under Section 164 Cr.P.C, it was observed by the concerned Metropolitan Magistrate that she was not capable of recounting or giving her statement and as such no statement was recorded. Even, during the trial, the prosecutrix was examined without oath and that too with the help of a translator. During her examination-in-chief, she stated that *“Mere saath lafda hua tha, mujhe pakad liya tha, meri aabroo lee thi”*. The witness also identified the appellant in court. During the cross-examination meaning of *lafda* and *aabroo* was asked by the learned counsel for the appellant, on which the prosecutrix failed to respond.

CONCLUSION

18. The presence of the appellant at the spot on the day of the incident was not only stated by PW-2 and PW-4, who were the independent eye witnesses but also by HC Babrik Kumar (PW-10), who was the PCR Incharge. Even the appellant, while cross-examining PW-2, gave a

suggestion that although the appellant was present at the spot, however, no girl was present with him. During the statement recorded under Section 313 Cr.P.C, he rather stated that the prosecutrix came after the quarrel between the appellant and PW-2, on which the appellant was pushed over the prosecutrix by PW-2 and his companion.

19. In view of above testimonies of PW-2, PW-4 and PW-10, it stands proved that the appellant was present at the spot at the time of the incident; that the prosecutrix was lying in naked condition and the appellant was found lying on top of the prosecutrix with his pant lowered upto his knees and that the PCR official removed the appellant and then both the appellant and the prosecutrix were taken to the hospital where they were medically examined.

20. Now, it is to be examined whether in view of the testimonies of the witnesses as well as the scientific evidence on record, the ingredients of the offence of rape are made out. Section 375 IPC defines rape. It reads as under:

“375. Rape – A man is said to commit ‘rape’ if he-

(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) *applies his mouth to vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-*”

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21. It is well settled that in a case of rape, the finding of guilt can be recorded even on the basis of uncorroborated testimony of the prosecutrix provided it is cogent and reliable.

22. Now, so far as the statement of the prosecutrix is concerned, she deposed (without oath) that “*Mere saath lafda hua tha, mujhe pakad liya tha, meri aabroo lee thi*”. Although in the cross examination an effort was made to seek explanation for the word *lafda* and *aabroo* but the prosecutrix could not clarify. The moot question that arises is whether a finding of guilt can be recorded on basis of such statement. In this regard, I may profitably refer to a decision rendered in Virender vs. State NCT of Delhi **2009 SCC OnLine Del 3083** where in a case of conviction under Section 376 IPC, the court was confronted with a similar situation when the prosecutrix instead of using the word rape used the word “*Galat Kaam* (Wrong act)” to describe the incident. It was held:

“42. Commission of an offence under Section 376 certainly requires some evidence with regard to the acts which were committed by an accused person to establish the ingredients of the offence. The statement which has been recorded in court does not at all enable any conclusion to be derived as to what was the comprehension of the prosecutrix as to what are the relations between a husband and wife. In any traditional and conservative Indian family, any act from mere touch to the ultimate intimacy of sexual intercourse between persons not married to each other would, in common parlance, would be

covered within the gamut of acts which could be labelled as galat kaam or gandi harkatein. This range would also cover the intimacies shared by a married couple.

43.....The testimony of the prosecutrix does not reflect as to what is her understanding of the physical intimacy which a married couple shares.

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46. Having regard to the well settled principles laid down by the courts and in several judicial pronouncements of the Apex Court, the acts alleged by the prosecutrix would not by themselves be sufficient to invite a finding of guilt for commission of an offence under Section 376 of Indian Penal Code. This is not to say that such conduct is permissible or acceptable. However, we are concerned with a finding of guilt for a serious charge of rape in the instant case.

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48. It needs no elaboration and has been repeatedly held that whatever be the nature of evidence oral or documentary, direct or circumstantial, it is essential for the prosecution to prove the necessary ingredients of the offence. In view of the above discussion, it may not be proper to return a finding of guilt against the appellant for the commission of an offence under Section 376 based on the deposition of the prosecutrix, oral evidence or the medical evidence which has been led by the prosecution.”

23. The above view was reiterated by a subsequent decision rendered in Harish & Ors Vs State Govt.of NCT of Delhi reported as **249 (2018) DLT 257 (DB)**.

24. Coming to the testimony of the eye witnesses i.e, PW-2, PW-4 and PW-10, it has come on record that they have only stated that the appellant was lying on top of the prosecutrix with his pants down and the

prosecutrix was in naked condition. Their depositions only establish that the appellant was lying on top of the prosecutrix but nothing more. Even, from a reading of the testimonies of the two Doctors i.e, PW-5 and PW-6, who medically examined the prosecutrix it has not come on record that there was any penetration. Further, in the MLC an abrasion was observed on the chin of the prosecutrix. Though no injury was noted in the internal examination yet it was advised to test if the blood present was menstrual. There is no explanation on the record if at all, the above test was carried out. So far as DNA report is concerned, it only opined that the blood of the prosecutrix was found on the clothes of the appellant.

25. To render a conviction under Section 376 IPC, it is imperative for the court to come to a definite conclusion that the ingredients of the offence are made out. The trial court has relied on the Section 375(C) IPC to convict the appellant. Section 375(C) IPC requires manipulation of any part of the women body to cause penetration into any part of her body, which are not the facts in the present case. As such, for the reasons mentioned above, this Court is of the view that the prosecution has failed to bring home the charge under Section 376 IPC against the appellant.

26. Now, the question arises, whether the appellant is liable to be convicted under Section 376/511 or Section 354 IPC. The fine distinction that separates the two is whether the appellant has crossed the stage of preparation and made an attempt to commit the offence and further, whether he continued to have the intention till the very last. From the facts, it stands established that the appellant by removing his clothes as well as that of the prosecutrix had reached the stage of attempt after

preparation. It is to be seen whether the appellant continued to have the intention to commit the crime till his attempt was foiled by the witnesses.

27. At this junction, it is profitable to refer to a decision rendered in an English case, R. vs. James Lloyd reported as (1836) 7 C&P 317, while summing up the charge to the Jury, Patterson, J. observed: -

“In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, 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.”

(Emphasis added)

28. While referring to the observations in the above decision, Supreme Court in Aman Kumar vs. State of Haryana reported as (2004) 4 SCC 379, 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.

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.” (Emphasis added)

29. In the case of Koppula Venkat Rao vs. State of Andhra Pradesh reported as **AIR 2004 SC 1874**, the accused by using criminal force took out the *sari* of the victim and got on top of her but ejaculated before the actual intercourse could take place. The Supreme Court converted the conviction of the accused from Section 376 IPC to Section 376/511 IPC.

30. In the case of Tarkeshwar Sahu vs. State of Bihar (Now Jharkhand) reported as **(2006) 8 SCC 560**, the appellant had forcibly taken the prosecutrix to his gumti for committing illicit intercourse with her. While traversing through the case law on the subject, it was held:-

“22. In the backdrop of settled legal position, when we examine the instant case, the conclusion becomes irresistible that the conviction of the appellant under Sections 376/511 IPC is wholly unsustainable. What to talk about the penetration, there has not been any attempt of penetration to the slightest degree. The appellant had neither undressed himself nor even asked the prosecutrix to undress so there was no question of penetration. In the absence of any attempt to penetrate, the conviction under Section 376/511 IPC is wholly illegal and unsustainable.

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36. In view of the foregoing facts and circumstances of the case, we are of the opinion that the crime committed by the accused was at initial stage of preparation. The offence committed does not come within the purview of offence punishable under Sections 376/511 IPC. The offence committed squarely covers the ingredients of Sections 366 and 354 IPC. The appellant was charged under Sections 376/511 IPC but on invoking the provisions of Section 222 of the Code of Criminal Procedure, the accused charged with major

offence can always be convicted for the minor offence, if necessary ingredients of minor offence are present.”

31. In the present case, it has come on record that the appellant was first noticed lying on the prosecutrix by PW-2. Thereafter, PW-2 called PW-4 (his uncle) who lived nearby. They made an attempt to remove the appellant from the top of the prosecutrix however, they failed.

32. PW-10, the PCR Incharge deposed that when he reached the spot, he saw the appellant lying on top of the prosecutrix in naked condition. He removed the appellant with the help of public present there and the prosecutrix and the appellant were made to wear their clothes and taken to the hospital.

33. In the MLC of the prosecutrix, an abrasion on the chin of the prosecutrix was also noted. In the FSL report, the blood of the prosecutrix was found on the clothes of the appellant. In the MLC of the appellant, which was conducted on the same night, it was observed that “No Smegma was present”. The absence of Smegma indicates a recent sexual activity unless the person has taken a bath. In Aman Kumar (Supra), it was noted:

“7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See Joseph Lines IC & K 893). It is well-known in the medical world that the examination of smegma loses all importance after twenty four hours of the performance of the sexual intercourse. (See Dr. S.P. Kohli, Civil Surgeon, Ferozepur v. High Court of Punjab and Haryana thr. Registrar MANU/SC/0080/1978 : 1978CriLJ1804). In rape cases, if the gland of the male organ

is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four hours."

(Emphasis added)

34. In the present case, the public witness saw the appellant at about 12.30 am and DD 4A was recorded at about 12.50 am. The appellant was apprehended from the spot and taken for his medical examination. The MLC of the appellant was conducted at 1.39 am. In this view of the matter, the absence of smegma indicate that the appellant made an attempt to commit the rape. Additionally, the appellant did not remove himself from top of the prosecutrix despite the effort made by PW-2 indicating that he had the requisite intention and the said intention continued till he was forcibly separated by PW-10 with the help of public.

35. During his examination under Section 313 Cr.P.C, the appellant while answering Question 7, admitted that he was taken along with the prosecutrix to the hospital in a PCR Van. While answering Question 25, the appellant stated that after doing his job he was going to his residence at Karawal Nagar and when he reached Gopalpur turn, he asked one motor cyclist about the way to Karawal Nagar which led to a quarrel between them. The motor cyclist called someone at the spot. In the meantime, prosecutrix also reached and then both the above said person pushed the appellant on the prosecutrix. Even then, it remains unexplained as to how the appellant was found with his pant lowered upto his knees. It is not the appellants case that his pant was pulled down either by PW-2/PW-4 or any other person. Even if the testimony of PW-

2 and PW-4 is kept aside, still the testimony of the PCR Incharge (PW-10), being an independent witness, is both reliable and creditworthy. The appellant had not alleged any motive to PW-10.

36. In somewhat similar facts, a coordinate bench of this court in Rajesh Sharma vs State reported as **2014 SCC Online Del 6811**, altered the conviction under Section 376 IPC to one under Section 376/511 IPC.

37. Resultantly, the appellant's conviction under Section 376 IPC is set aside however, in view of above analysis, there is sufficient evidence on record to render a finding of guilt against him under Section 376/511 IPC. The conviction of the appellant under Section 376 IPC is altered and modified to one under Section 376/511 IPC. The appellant's sentence is modified to RI for 5 years. The fine and the default sentence shall remain the same.

38. The appeal filed by the appellant is partly allowed in the above terms. LCR be returned to the trial court. A copy of this judgment be sent to the appellant through the Superintendent Jail, free of cost.

 (MANOJ KUMAR OHRI)
JUDGE

JULY 29, 2019
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