

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 920 of 2002

- Maheshwar Kumar

---- Appellant

Versus

- The State Of Chhattisgarh

---- Respondent

Post for pronouncement of the judgment on	07.10.2021
	<u>Sd/-</u>
	JUDGE

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on : 13.09.2021

Judgment delivered on : 07.10.2021

CRA No. 920 of 2002

- Maheshwar Kumar, S/o. Chitaram Mahar, Aged about 29 years, Occupation Electrician, R/o. Village Dhudhava, Police Station Narharpur, District Kanker (CG)

---- Appellant

Versus

- The State Of Chhattisgarh, Through PS Narharpur, District Kanker (CG)

---- Respondent

For Appellant	:	Shri Vishnu Koshta, Advocate assisted by Shri Shobhit Koshta, Advocate
For Respondent/State	:	Shri Raghavendra Verma, GA

Hon'ble Smt. Justice Rajani Dubey

C A V Order

07/10/2021

This appeal arises out of the judgment and order dated 23.08.2002 passed by the First Additional Sessions Judge, Kanker, district Kanker in Sessions Trial No.365/2001 convicting the accused/appellant under Section 376/511 IPC and sentencing him to undergo rigorous imprisonment for five years and to pay fine of Rs.1,000/- with default stipulation.

2. Brief facts of the case are that on 08.06.2001, prosecutrix, a minor aged 7 years, was playing outside her house at about 7.00 p.m.

and her mother and sister were inside, at that time, accused Mahesh, who was the neighbour, came and asked her to come along with him and he will give a box to her. It is further case of the prosecution that when she went with him to his shop, he closed the shutter and undressed himself and after undressing the victim, committed sexual intercourse and then asked her to come on the next day. She narrated about the incident to her sisters Neha and Nidhi and was later informed by her sister to their mother. Thereafter, her mother informed her father and then FIR was lodged against the appellant under Section 376 IPC. On 17.06.2001 itself prosecutrix was medically examined by Dr. Smt. Hemlata Sahu (PW-11) vide Ex.P-12 however there was no sign of injury on the prosecutrix and she was referred to the Gynecologist Dr. Smt. M.Tiwari (PW-12) who opined that there was no injury on the private part and the hymen was found intact. After preparing slides, she was sent to the radiologist for age determination and after examination vide Ex. P-13, she opined that the prosecutrix was aged between 6 to 9 years. Accused/appellant was also medically examined Dr. Naresh Kumar Goyal (PW-8) on 31.12.2001 vide Ex.P-6 and was found capable of performing sexual intercourse. After investigation, charge sheet was filed against the appellant. Accordingly charges were framed against him.

3. In order to establish the guilt of the accused/appellant, prosecution has examined 14 witnesses. Statement of the accused/appellant was also recorded under Section 313 of the Cr.P.C. in which he denied the charges levelled against him and pleaded innocence and false implication in the case. One defence witness was examined by the accused to establish his defence.

4. After hearing the parties, the trial Court by judgment impugned has convicted and sentenced the accused/appellant Maheshwar Kumar for charges under Section 376/511 IPC and sentenced as mentioned in paragraph 1 of the judgment. Hence the present appeal.

5. Counsel for the appellant submits that the order of conviction and sentence passed by the learned court below is illegal, perverse as per provisions of law. The court below has completely failed to appreciate the statements of the prosecutrix (PW-1), her father Suresh Kumar (PW-2) and sister Vidhi Rai (PW-6). All the witnesses are the family members of the prosecutrix and they have not disclosed about the incident to anyone and there is no independent witness to the incident. He submits that the FIR was lodged after nine days of the incident and no satisfactory explanation has been given which clearly shows that they have falsely lodged the report. It is admitted fact that 15 days prior to the incident, appellant has made a complaint against the father of the prosecutrix and the police has registered a case and due to the said enmity they have lodged a false report. As per the medical report, the hymen was found intact and there was no injury on the internal or external part of her body which clearly shows that no prima facie case is made out against the appellant. Learned trial court has committed grave error by not considering the defence witness. He has clearly stated in his evidence that from 01.06.01 to 16.07.2001 shop of the appellant was closed and he has gone to Bhilai. Learned court below did not appreciate the oral and documentary evidence properly therefore the conviction and sentence of the appellant is liable to be set aside. Reliance has been placed in the matter of **Sumer Builders Pvt.**

Ltd. Vs. Narendra Gorani reported in **AIR 2016 SC (Supp) 973**; **Parminder Kaur & Others Vs. State of Punjab** reported in **AIR 2020 SC 3815**; **Santosh Prasad Vs. State of Bihar** reported in **AIR 2020 SC985**; **A. Prabhakara Reddy and Co. Vs. State of Madhya Pradesh and Others** reported in **AIR 2015 SC 3293**; **Aman Kumar and Others Vs. State of Haryana** reported in **AIR 2004 SC 1497**; **Raghuvir Vs. State of Madhya Pradesh (Now CG)** in **Cr.A. No. 1777 of 1996** passed by this Court vide order dated 11.04.2011.

6. On the other hand, State counsel supports the impugned judgment and submits that the conviction of the accused/appellant is in accordance with law and there is no infirmity in the same.

7. Heard counsel for the parties and perused the material available on record.

8. Prosecutrix (PW-1) has stated that after closing the shutter of his shop, the appellant undressed himself and after undressing the victim, she said to leave her and she has to go home but he was saying that he will commit overt act. In the Court, when the victim was asked as to what act was done by the accused/appellant, she stated that he made an attempt to do the alleged act. The trial court has found that the offence would come under Section 376/511 IPC for attempting to commit rape. Suresh Kumar (PW-2) and Gayatri Rai (PW-3) father and mother of the prosecutrix have stated that their daughter has narrated the incident to them. Niharika @ Neha Rai (PW-4) and Vidhya Rai (PW-5) sisters of the victim have also stated that the prosecutrix has informed about the incident to them. In the cross-examination, the

witnesses remained firm and nothing could be elicited from them. Dr. Smt. Hemlata Sahu (PW-11) has examined the prosecutrix vide Ex.P-12 and she has not found any internal or external injuries on the body of the victim. Dr. Smt. M.Tiwari (PW-13) is the Gynecologist who has examined the victim vide Ex.P-15 and she opined that there was no injury found on her private part and the hymen was found intact.

9. The apex Court in the matter of **Aman Kumar and Others Vs.State of Haryana** has held that,

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 it ended, 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 shows 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.

10. In the present case, the prosecutrix has stated that the accused tried to penetrate her but she resisted and went home. Therefore there is no material to show that the accused was determined to have sexual intercourse. Hon'ble Apex Court has stated that in the aforesaid background the offence cannot be said to be attempt to commit rape to attract the culpability under Section 376/511 IPC but the case is certainly one of indecent assault upon a woman. Essential ingredients of the 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. Taking into consideration, the statement of the prosecutrix, facts of the case and medical report, suggests that the accused was making an attempt to outrage the modesty of a woman.

11. In the view of the matter, the conviction of the appellant under Section 376/511 IPC is not made out against him and instead thereof it is altered to that under Section 354 IPC and is thus convicted under the said Section. Appellant has remained in jail for more than 4 ½ months therefore, his sentence may be reduced to the period already undergone by him. Appellant is reported to be on bail. His bail bonds stand discharged.

12. In the result, the appeal is partly allowed.

Sd/-

(Rajani Dubey)
Judge